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PETITION FOR A WRIT OF CERTIORARI

Petitioner Finance One Public Company Limited ("FinOne") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 12, 2005.

INTRODUCTION

In today's global economy, determinations of foreign law are increasingly important. Commercial disputes routinely require courts to ascertain and apply foreign law. Foreign law questions frequently implicate international comity. Incorrect resolutions of foreign-law issues reached through flawed procedures may nullify other nations' policies and threaten international discord.

The Second Circuit in this case committed two errors that resulted in precisely such nullification and discord, thereby demonstrating the urgent need for this Court's review to end disarray in the lower federal courts on two narrow but exceptionally important questions respecting the procedures federal courts employ to determine the content of foreign law.

First, the court of appeals refused to apply a concededly indistinguishable Thai judicial decision solely because it was not binding precedent. The court thereby violated principles of international comity requiring deference to a foreign court's determination of its nation's laws. *Second*, the court refused to resolve a separate point of Thai law on the ground that petitioner failed to meet a burden of definitively substantiating the point, thereby relieving the court of the obligation to decide it. Deepening an enduring split among the courts of appeals, the Second Circuit thereby transgressed Federal Rule of Civil Procedure 44.1, which treats the content of foreign law as a

question of law determined *de novo* rather than as a question of fact subject to evidentiary rules and burdens of proof.

The Second Circuit's erroneous refusal either to defer to the Thai courts or to determine Thai law achieved precisely the result that the Thai government sought to avoid. The court of appeals' errors led it to reject FinOne's two key defenses and to allow a setoff that the Thai Ministry of Finance's orders precluded. Permitting that setoff advantaged one particular creditor at the expense of others, undermining a central purpose of those orders. The Second Circuit thereby dismantled an important aspect of Thailand's efforts to redress a national crisis.

This Court's review is thus necessary to restore the policies of an important U.S. trading partner and to end the confusion among the lower courts on two narrow but important questions – questions that, had the Second Circuit answered them correctly, would have avoided the flouting of Thailand's policies: the proper deference due foreign court decisions and the proper procedure when the parties' submissions do not definitively substantiate a point of foreign law.

OPINIONS BELOW

The opinion of the court of appeals is reported at 414 F.3d 325 and is reprinted at Pet. App. 1a-38a. The opinions of the district court are reprinted at Pet. App. 39a-80a.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2005. Pet. App. 1a-2a. A timely petition for rehearing was denied on January 3, 2006. Pet. App. 81a-82a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Rule of Civil Procedure 44.1 provides: "A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law."

STATEMENT OF THE CASE

A. Factual Background

This diversity case concerns a dispute under Thai law between FinOne, once a leading Thai financial services company now in receivership, and Lehman Brothers Special Financing Inc. ("LBSF"), an affiliate of Lehman Brothers Inc. FinOne and LBSF entered into derivative transactions (interest rate and currency swaps) in 1995 and 1996. Separately, FinOne sold bills of exchange to Lehman Brothers Thailand ("LBT"), a Thai Lehman Brothers affiliate. The bills of exchange ("Bills"), a form of debt, required FinOne to make payments to LBT in Thai baht and in Bangkok when the Bills became due.

In 1996, Thailand along with the rest of Southeast Asia experienced a catastrophic economic meltdown. Interest rates soared; the value of the Thai baht plummeted. The crisis rapidly precipitated the insolvency of numerous financial institutions, including FinOne. The crisis also had a pronounced impact on the two quite different instruments FinOne had exchanged with LBSF and LBT. By June 1997, the Thai baht's decline resulted in LBSF owing FinOne approximately $9.7 million on the derivative transactions. By contrast,

FinOne's insolvency rendered the Bills held by LBT nearly worthless.

On June 26, 1997, several weeks after FinOne began defaulting on its debts, the Thai Ministry of Finance issued orders suspending the business operations of FinOne and 55 other Thai financial services companies. The Thai Finance Ministry continued FinOne's suspension indefinitely in an order issued on July 25, 1997. The Thai Ministry of Finance issued the June and July 1997 orders, which have the full force and effect of law, both to stabilize the economy and to protect creditors. To achieve these objectives, the orders, among other things, prohibited FinOne and other affected companies from paying amounts owed under bills of exchange, including the Bills FinOne had issued to LBT.

As the Thai Finance Ministry moved to protect FinOne's creditors, LBSF maneuvered to advantage itself at their expense by circumventing the Finance Ministry's orders. Literally on the eve of the Thai Finance Ministry's June 1997 order, LBSF negotiated to obtain the FinOne Bills from LBT, a transfer accomplished after that order became effective. LBSF knew that FinOne's insolvency rendered the Bills nearly worthless. The Bills, however, possessed a face value nearly equivalent to the amount LBSF owed FinOne under the derivative transactions. If LBSF could validly setoff the nearly worthless Bills against the derivative transactions at face value, LBSF would effectively eliminate its derivative obligations to FinOne. Indeed, Lehman personnel formed a "group" to implement what they termed "the project" – namely, to allow LBSF to escape payment on the derivative obligations, while allowing LBT to recover fully on the near-worthless Bills. LBSF thus "admitt[ed] that the transfer of the [Bills] was motivated, at least in part, by the desire to create setoff rights against its derivative obligations to Finance One, and that at the time of

transfer it was aware that Finance One had begun defaulting on its debts." Pet. App. 34a.

Once LBSF obtained the Bills, it carried out the next phase of "the project." After the Thai Finance Ministry issued the July 1997 order continuing FinOne's suspension, LBSF terminated the derivative transactions, triggering payment under them to FinOne. LBSF then claimed the face value of the Bills as a setoff. Thus, rather than pay FinOne the approximate $9.7 million owed under the derivative transactions, LBSF tendered FinOne $12,000 – $9.7 million less the setoff. LBSF thus achieved precisely what the Thai Finance Ministry's order prohibited. Although the Finance Ministry's order forbade payment on bills of exchange to protect creditors, LBSF secured payment on FinOne's Bills through the setoff, thereby reducing the assets available for distribution to other FinOne creditors.

B. Proceedings in the District Court

Believing the setoff unlawful, FinOne filed a diversity suit against LBSF in 2000 for breach of contract seeking the full amounts due under the derivative transactions. FinOne contended, *inter alia*, that LBSF lacked any setoff right and that any setoff was invalid because (i) LBSF acted in bad faith in obtaining the Bills from LBT and because (ii) the Finance Ministry's orders forbade payment on the Bills – either of which provided a defense to setoff under Thai law.

The district court initially determined that Thai rather than New York law governed the dispute and that any right to setoff arose, if at all, by operation of law rather than by contract. Pet. App. 68a. Both parties submitted expert testimony on Thai law and cross-moved for summary judgment. The court abstained from ruling on "whether under Thai Law defendant [LBSF] possessed an extra-contractual set-off right" because "the experts on Thai law each party offered seemed equally distin-

guished and credible and yet came to opposite conclusions." Pet. App. 50a-51a. The court therefore appointed a Special Master "to resolve the single outstanding issue." Pet. App. 51a.

The Special Master concluded that LBSF possessed a qualified right to setoff under Thai law and that Thai courts would exercise equitable discretion to limit LBSF's setoff to protect the rights of FinOne's other creditors. Pet. App. 51a-52a. The district court, conducting a *de novo* review, agreed with the Special Master and reduced LBSF's setoff to reflect the ratio of FinOne's assets to liabilities. Pet. App. 52a-53a. Accordingly, the district court entered judgment in favor of FinOne for $5.3 million, which reflected the total due on the derivative transaction less the partial setoff, plus prejudgment interest. Pet. App. 41a-42a. Both parties appealed. LBSF appealed the court's reduction of the setoff and calculation of interest; FinOne cross-appealed the district court's determination that LBSF be allowed even a partial setoff.

C. The Second Circuit's Reversal

The Second Circuit reversed and ordered judgment entered for LBSF. The court of appeals recognized that New York choice-of-law principles required applying Thai law because, among other reasons, "Thailand has a strong interest in having the effect of its government's orders determined in accordance with Thai law." Pet. App. 26a. The court nonetheless nullified those orders by concluding that LBSF validly setoff the Bills.

1. The court of appeals found a right to setoff in Section 341 of the Thai Civil and Commercial Code. The court nonetheless agreed with FinOne that any such "setoff right is limited by Section 344 of the Code which states that: 'A claim against which there is a defence may not be set off.'" Pet. App. 30a (citation omitted). As in the district court, FinOne raised,

inter alia, two Section 344 "defence[s]." *First*, that the July 1997 Finance Ministry's order prohibiting payment on bills of exchange "created a defense to its payment obligation under the bills of exchange, so that setoff was prohibited." Pet. App. 30a; *second*, that LBSF acquired the Bills from LBT in bad faith, which creates a defense because the Thai Civil and Commercial Code requires that one "act in good faith" in the "exercise of his rights and in the performance of his obligations." Pet. App. 30a (internal quotations omitted). The court of appeals rejected both defenses.

2. In rejecting FinOne's defense based on the July 1997 Ministry of Finance order, the court of appeals conceded that the order "clearly forbade Finance One from voluntarily making payment on any of its outstanding bills of exchange." Pet. App. 32a. The court nonetheless concluded that the order forbidding payment on the Bills did not necessarily preclude a setoff having exactly the same consequence. The court reasoned: "this preclusion does not necessarily imply that the order would constitute a defense in a civil action seeking payment in a Thai court." Pet. App. 32a-33a.

Notably, neither FinOne nor LBSF had framed the Section 344 "defense" inquiry as turning on the impact of the Finance Ministry's order in hypothetical civil litigation between the parties. FinOne had straightforwardly argued that the Finance Ministry's orders rendered the Bills non-payable and thus unenforceable, which created a defense because an obligation, to be setoff, must be enforceable.[1] Thus, quite unsurprisingly,

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[1] LBSF responded to FinOne's Section 344 argument in a one-sentence footnote that conclusorily asserted: "any effect the Orders may have had" did not "render the Bills of Exchange unenforceable or provide a 'defense'" to setoff. Reply Brief of Defendant-Appellant LBSF, at 24 (2d Cir. filed June 25, 2004).

the Second Circuit found that "[n]one of the Thai legal materials in the record *definitively resolves*" whether "the order would constitute a defense in a civil action seeking payment in a Thai court." Pet. App. 33a (emphasis added).

After *sua sponte* recasting the Thai law issue posed by FinOne's Section 344 defense, the court inexplicably and improperly treated the matter as one susceptible to evidentiary proof rather than *de novo* legal analysis, and found a fatal failure of proof. Strikingly, the court did not determine the issue of Thai law it posed, order further briefing on it, or otherwise consider the appropriate course under Federal Rule of Civil Procedure 44.1 when available materials do not "definitively resolve[]" a foreign law issue. Rather, the court ruled that the absence of materials "definitively resolv[ing]" the issue – an inevitable consequence of the court's recasting the issue *sua sponte* – required holding that FinOne failed to discharge a substantive burden of production: "Because Finance One bears the burden of establishing its defense to enforcement of the bills," and because no materials "definitively resolve[d]" the Thai law issue as framed, the court "conclude[d] that the Ministry order does not negate LBSF's right to setoff." Pet. App. 33a.

3. The court of appeals next rejected FinOne's alternative defense: that LBSF acted in bad faith in acquiring the Bills from LBT. In arguing that LBSF acted in bad faith, FinOne invoked *Huaykaew Real Estate Co.* v. *CMIC Fin. & Sec. Public Ltd.*, Book No. 7085/2542 No. 78 (S. Bangkok Civ. Ct. June 14, 1999), the "only Thai case cited by either party" (Pet. App. 33a). *Huaykaew* involved an attempt to setoff against other debts financial instruments acquired after promulgation of the very same 1997 Thai Ministry of Finance orders at issue in this case. *Huaykaew* held that evidence that "the plaintiff should be well aware that the defendant . . . was unable to make profits or

repay the payment under the [instruments] as usual" when "the plaintiff bought the defendant's debentures with an intention for a setoff" established a "bad faith" defense to setoff under Sections 5 and 344 of the Thai Commercial Code. Pet. App. 33a-34a (quoting *Huaykaew*). *Huaykaew* emphasized that permitting a setoff in such circumstances would improperly confer upon the party invoking it "an advantage over the defendant's other bona fide creditors and debtors." Pet. App. 34a.

The Second Circuit recognized *Huaykaew* to be indistinguishable because LBSF, like the plaintiff in *Huaykaew*, "admitt[ed] that the transfer of the [Bills from LBT] was motivated, at least in part, by the desire to create setoff rights against its derivative obligations to Finance One, and that at the time of transfer it was aware that Finance One had begun defaulting on its debts." Pet. App. 34a. Indeed, the court conceded: "Were we to follow *Huaykaew*," the case would "raise a factual issue for resolution at trial" on bad faith. Pet. App. 35a.

Despite acknowledging that *Huaykaew* was directly on point, the court refused to follow it. The court deemed "*Huaykaew* of limited persuasive force" solely because "Thailand is a civil-law jurisdiction where judicial decisions in general are of only persuasive and not binding authority." Pet. App. 35a. Without explaining *why* "the only Thai case cited by either party" was unpersuasive (Pet. App. 33a), the court instead adopted the Special Master's flawed analysis and held that LBSF acted in good faith as a matter of law.[2]

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[2] The Special Master concluded that LBSF acted in good faith because "[t]here was no evidence to show that the purpose of the exercise" – that is, LBSF's "attempt[] to *redeem* the bills of exchange at a critical moment before their maturity dates" – "was to take undue advantage, less to defraud

4. Finally, having concluded that LBSF lawfully setoff the Bills, the court of appeals overturned the district court's application of Thai equitable principles, granted LBSF the entire setoff it sought, and entered judgment for LBSF. The court of appeals held that the district court abused its discretion by adopting the Special Master's recommendation to reduce the setoff without "conduct[ing] an independent analysis of the appropriateness of equitable relief." Pet. App. 36a. The court of appeals, however, did not remand for the district court to exercise its equitable discretion in the first instance or develop further facts relevant to that analysis – the appropriate course, particularly given the case's summary judgment posture.

Rather, engaging the same result-oriented jurisprudence that characterized its debasing of *Huaykaew* and its side-stepping of the effect of the Finance Ministry's orders, the court of appeals usurped the district court's discretion and made its own equitable determination. The court held equity not to warrant reducing LBSF's setoff because, according to the court, LBSF acted in good faith and because the court was "not concerned that LBSF" would "receiv[e] an unconscionable windfall" in derogation of "any Thai public policy." Pet. App. 37a-38a.

Both conclusions rested on the court's erroneous refusal to apply *Huaykaew*. For that concededly indistinguishable decision, if followed, precluded finding good faith as a matter

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other possible creditors." Pet. App. 106a (emphasis added). The Special Master – who never so much as mentioned *Huaykaew* – thus erroneously focused on whether LBSF had an intent to defraud creditors when LBSF *presented* the Bills for setoff rather than, as *Huaykaew* instructs, on whether LBSF was aware that FinOne had begun defaulting on its debts when LBSF *acquired* the Bills. The Second Circuit simply repeated the Special Master's flawed analysis.

of law and recognized that setoffs advantaging one creditor over others flout Thai public policy as expressed in the Finance Ministry's 1997 orders barring insolvent firms' payment of debts. Indeed, the Second Circuit achieved precisely the result that the Thai Finance Ministry in its orders sought to prevent: the court gave LBSF an effective right to payment on the Bills to the derogation of the rights of other creditors.

REASONS FOR GRANTING THE PETITION

In rejecting FinOne's defenses to LBSF's setoff, the Second Circuit defied international comity by refusing to follow a directly-on-point Thai court decision merely because that decision was not binding. The court also violated Rule 44.1 by holding against FinOne solely because FinOne did not meet a supposed evidentiary burden of definitively substantiating a point of Thai law, one raised *sua sponte* long after FinOne filed its briefs. The Second Circuit's misunderstanding of the proper procedures for determining foreign law raises two important, frequently recurring issues that have divided the federal courts of appeals and that implicate this nation's relations with key trading partners, one of whose decrees the Second Circuit improperly vitiated.

I. THE SECOND CIRCUIT'S REFUSAL TO DEFER TO A THAI COURT'S ARTICULATION OF THAI LAW CONFLICTS WITH PRINCIPLES OF COMITY RECOGNIZED BY THE FEDERAL COURTS

1. Comity "is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation." *Hilton* v. *Guyot*, 159 U.S. 113, 163-64 (1895). Comity's core objective is "to produce a friendly intercourse between the sovereignties to which [individuals]

belong." *Id.* at 165 (internal quotations omitted). Courts invoke comity, for example, to enforce foreign judgments, whether issued by a civil or common law jurisdiction. *See, e.g., United States* ex rel. *Saroop* v. *Garcia*, 109 F.3d 165, 169 (3d Cir. 1997) (comity "creates a strong presumption in favor of recognizing foreign judicial decrees"). Such deference "fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations." *Id.* (citing cases).

When federal courts ascertain foreign law, achieving these "worthy goals of comity," *General Elec. Co. v. Deutz A.G.*, 270 F.3d 144, 160 (3d Cir. 2001), requires deferring to a foreign sovereign's determination of the content of its own laws. This Court "ha[s] long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation." *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 546 (1987). Applying this principle, the federal courts have accorded "substantial deference" to the "construction" a foreign sovereign "places on its domestic law" when the foreign sovereign is a litigant. *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992). As courts have recognized, "[g]iving the conclusions of a sovereign nation less respect than those of [a U.S.] administrative agency is unacceptable." *Id.* at 1312.

2. The same principle requires according deference to a foreign court's determination of the content of its law when that issue of foreign law must be decided by a federal court. *See Amoco Cadiz*, 954 F.2d at 1313-1314 (following "[t]wo cases interpret[ing] the [French] Civil Code"); *Pittway Corp.* v. *United States*, 88 F.3d 501, 505 (7th Cir. 1996) (relying on French "precedents" to conclude that a shareholder action was not "meaningless as a matter of [French] law"); *Bamberger* v.

Clark, 390 F.2d 485, 489 (D.C. Cir. 1968) (court would reach different result if confronted with German precedent deciding issue of German law); *Films by Jove, Inc.* v. *Berov*, 250 F. Supp. 2d 156, 196 (E.D.N.Y. 2003) (explicating principle of deference). Such deference is not absolute; but to disregard a directly on point decision of the sovereign whose laws it is to construe, a federal court must find "countervailing evidence or other circumstances weighing against deference." *Films by Jove*, 250 F. Supp. 2d at 196.

Deferring to a foreign court's interpretation of its own law, as with deferring to a foreign sovereign's position respecting its own law, fulfills comity's core purposes. "The basic objective underlying the application of the law of another jurisdiction is to achieve a uniform result regardless of where suit is brought." Note, *Proof of the Law of Foreign Countries*, 72 Harv. L. Rev. 318, 318 (1958). To disregard a foreign court's interpretation of its own laws is to encourage forum shopping that undermines "predictability and stability" in international intercourse. *Saroop*, 109 F.3d at 169. Interpreting a sovereign's law in a manner at odds with the reading given by its own courts also needlessly menaces "interference with the domestic activities of other sovereign nations." *Republic of the Philippines* v. *Westinghouse Elec. Corp.*, 43 F.3d 65, 75 (3d Cir. 1994).

3. The Second Circuit flouted these principles of comity by refusing to follow *Huaykaew*, a decision the court admitted was indistinguishable. The sole reason the Second Circuit gave for ignoring *Huaykaew*, "the only Thai case cited by either party" (Pet. App. 33a), was that "Thailand is a civil-law jurisdiction where judicial decisions in general are of only persuasive and not binding authority." Pet. App. 35a. The Second Circuit's newly-minted exception to comity-compelled principles of deference makes no sense. Few court decisions are *determinative* of a nation's law. A court decision, binding

or not, constitutes "probative evidence of the matters . . . addressed therein." *Films by Jove*, 250 F. Supp. 2d at 192. Moreover, precedent is not irrelevant in civil law jurisdictions. Courts "can turn to judicial decisions to the extent that they fill in gaps left by law or custom." *E.g.*, *Banco de Credito Industrial, S.A.* v. *Tesoreria General*, 990 F.2d 827, 833 (5th Cir. 1993). Accordingly, that a foreign decision is not binding because rendered by a civil law jurisdiction "is not, in itself, a sufficient ground for disregarding the legal conclusions articulated [there]in." *Films by Jove*, 250 F. Supp. 2d at 196; *see also* Doug M. Keller, *Interpreting Foreign Law through an Erie Lens*, 40 Tex. Int'l L.J. 157, 177 (2004) ("[C]ivil law jurisdiction court decisions should be followed unless there is 'persuasive data' that the law is otherwise.").[3]

Not surprisingly, the Second Circuit's poorly-reasoned "civil law" exception to comity conflicts with the decisions of numerous other courts according deference to civil law precedents absent a persuasive reason for giving foreign law a different reading. *See, e.g.*, *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1313-14 (7th Cir. 1992); *Ramsay* v. *Boeing Co.*, 432 F.2d 592 (5th Cir. 1970); *Bamberger* v. *Clark*, 390 F.2d 485, 489 (D.C. Cir. 1968); *Films by Jove*, 250 F. Supp. at 196; *American Int'l Speciality Lines Ins. Co.* v. *Canal Indemnity Co.*,

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[3] Because the court of appeals discarded *Huaykaew* solely because it was not binding, the court looked for no such "persuasive data." Had it done so, it would have found no persuasive reason to depart from *Huaykaew*. As explained, the Special Master addressed the wrong issue. *See supra* note 2. Moreover, the Second Circuit itself had previously expressed "considerable doubt whether . . . New York would allow a set-off of a claim acquired . . . from a closely related corporation where the result would be to permit the assignor" to "receive full payment on its claim rather than pursue the claim in bankruptcy along" with "other creditors." *Modern Settings, Inc.* v. *Prudential-Bache Sec., Inc.*, 936 F.2d 640, 648 (2d Cir. 1991).

352 F.3d 254, 261 (5th Cir. 2003) (court would not disregard appellate decisions in Louisiana, a civil law jurisdiction, absent "persuasive data that the highest court of the state would decide otherwise" (internal quotations omitted)); *cf. General Star Nat'l Ins.* Co. v. *Administratia Asigurarilor de Stat*, 289 F.3d 434, 439 (6th Cir. 2002) (deferring to English Courts' interpretation of Romanian law).[4]

4. The Second Circuit's error is particularly egregious, and especially warrants this Court's review, because its refusal to follow a directly-on-point Thai decision resulted in the very friction with foreign nations that comity-based doctrines are designed to prevent.[5]

The Thai Finance Ministry decrees that FinOne invoked prohibited the payment of debts, including by setoff, in order to

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[4] It also conflicts with Second Circuit decisions recognizing that "a foreign sovereign's views regarding its own laws merit – although they do not command – some degree of deference." *Kharaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002). Indeed, other Second Circuit panels have invoked civil law precedent in determining foreign law. *See, e.g., United States Fid. & Guaranty Co.* v. *Braspetro Oil Servs. Co.*, 369 F.3d 34, 54 n.19 (2d Cir. 2004) (Brazilian law); *Carlisle Ventures, Inc.* v. *Banco Espanol de Credito, S.A.*, 176 F.3d 601, 608 (2d Cir. 1999) (Spanish law).

[5] This Court's decisions recognize the important separation of power concerns that animate comity-based doctrines, including preventing unauthorized intrusions by the federal judiciary into this nation's foreign affairs. *See, e.g., F. Hoffman-La Roche Ltd* v. *Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 304 (1918) (Act of State doctrine avoids judicial acts that "certainly imperil the amicable relations between governments and vex the peace of nations" (internal quotations omitted)).

protect the creditors of insolvent Thai financial institutions. The assets of insolvent Thai firms are ordinarily distributed equally among creditors of similar standing. This fundamental principle of treating similarly-situated creditors of an insolvent corporation equally is an elemental principle not just in Thailand, but also in the United States. *See Remington Rand Corp. v. Business Sys., Inc.*, 830 F.2d 1260, 1271 (3d Cir. 1987). The equal-treatment principle, however, is subverted if an entity owing money to an insolvent firm purchases a portion of the firm's debt and invokes that debt as a setoff against the monies owed the insolvent firm. This is because the entity setting off the newly-purchased debt escapes making a payment distributed to all creditors, thereby reducing every other creditor's recovery.

To prevent schemes that defeat the object of treating similarly-situated creditors equally, the Finance Ministry issued decrees (the June and July 1997 orders) that prevented setting off most debts and imposed other restrictions on insolvent firms. The materially "indistinguishable" (Pet. App. 34a) *Huaykaew* decision recognized that permitting setoffs would defeat the Finance Ministry's orders. There, as here, the timing of the transactions "indicates that the defendant bought the defendant's debentures with an intention for a setoff" which would lead to "the plaintiff [having] an advantage over the defendant's other bona fide creditors." Pet. App. 34a. For this reason, *Huaykaew* held the defendant to have acted in bad faith in obtaining the debentures, which precluded invoking them to obtain a setoff. Pet App. 149a.

The Second Circuit, by casting *Huaykaew* aside without any reason other than it was not binding, advantaged LBSF over FinOne's other creditors in defiance of a central purpose of the Finance Ministry's orders. LBSF effectively received full payment on the Bills and LBSF avoided satisfying its debt to FinOne, thereby reducing the funds available for distribution to

other creditors. The Second Circuit thereby undermined an important aspect of Thailand's economic recovery program and achieved the very result that the Thai government sought to avoid. As the Bank of Thailand, a governmental body empowered to regulate the affairs of financial institutions, explained in addressing precisely the situation confronting FinOne: when one acquires an insolvent firm's bill of exchange and seeks to setoff that bill against debts owed to that firm, "[s]uch event causes damages to other bona fide creditors of" the companies affected by the Finance Ministry's orders. Pet. App. 152a.

This Court's review is thus needed to correct the Second Circuit's improper subversion of the policies of an important U.S. trading partner and to overturn the Second Circuit's baseless refusal to follow principles of international comity – principles that, if adhered to, would have prevented the court from impairing Thailand's policy of protecting creditors.

II. THE SECOND CIRCUIT'S TERMINATION OF FINONE'S CLAIMS SOLELY BECAUSE FINONE DID NOT DEFINITIVELY SUBSTANTIATE THAI LAW CONTRAVENES RULE 44.1 AND CONFLICTS WITH THE RULE IN NUMEROUS OTHER COURTS OF APPEALS

In rejecting FinOne's defenses to setoff, the Second Circuit erred not only by refusing to apply Thai Law in derogation of principles of comity, but also by granting summary judgment against FinOne for failing to substantiate definitively Thai Law in contravention of Federal Rule 44.1. Indeed, the rule in the Second Circuit now is that a party *silent* as to the content of foreign law has its claims judged under the law of the forum, but a party that fails to meet the extraordinary burden of *definitively* demonstrating foreign law loses on the merits. The Second Circuit's illogical doctrine, which improperly treats

demonstrating foreign law as a question of fact and deepens an acknowledged and enduring division among the federal courts of appeals independently warrants this Court's review.

A. The Second Circuit's Treatment of Foreign Law as Subject to Evidentiary Burdens of Persuasion Contravenes Rule 44.1

1. Before Rule 44.1's enactment in 1966, the federal courts commonly treated foreign law as the Second Circuit did here: as a question of *fact* for which the party with the burden of persuasion must submit triable evidence. *See, e.g., Talbot* v. *Seeman*, 5 U.S. (1 Cranch) 1, 12 (1801). *See generally* Arthur R. Miller, *Federal Rule 44.1 and the Fact Approach to Determining Foreign Law*, 65 Mich. L. Rev. 615, 620-21 (1967). Indeed, under the "fact" treatment of foreign law, federal courts required parties to plead foreign law, demanded admissible evidence of foreign law, and showed deep reluctance to take judicial notice of such law. *See* Miller, *supra*, at 621-24.

A corollary of the "fact" treatment of foreign law was that the failure of a party with the burden of persuasion to present sufficient evidence of foreign law led to a dismissal on the merits. *See Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473, 478 (1912); *Walton* v. *Arabian Am. Oil Co.*, 233 F.2d 541, 543-45 (2d Cir. 1956). *See generally* Louise E. Teitz, *From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in US Courts*, 34 J. Mar. L & Com. 97, 104 (2003) ("Before Rule 44.1, neglecting to prove foreign law generally resulted in a failure of proof and therefore in judgment against the party relying on foreign law."). This "[d]raconian consequence" of forfeiture, precisely the result reached by the Second Circuit here, was subject to limited exceptions. *See* Miller, *supra*, at 633-37.

In part to overturn this "harsh" regime, *id.*, at 634, Rule 44.1 was enacted in 1966. Rule 44.1 effected a sea-change in the determination of foreign law by the federal courts. Rule 44.1 decisively rejected the previous practice of treating foreign law as a question of fact. The Rule specifically states that "[t]he court's determination" of foreign law "shall be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1. Consistent with freeing courts from the "fact" theory of foreign law, Rule 44.1 (i) permits courts to "consider any relevant material or source," *id.*; (ii) unshackles courts from the Federal Rules of Evidence in determining foreign law, *id.*; and (iii) authorizes courts to engage in independent research, *id.* (Adv. Comm. Note). As is evident from these changes, "[o]ne of the objectives of Rule 44.1 is to abandon the fact characterization of foreign law and to make the process of determining alien law identic with the method of ascertaining domestic law to the extent that is possible." Miller, *supra*, at 657; *see also* Keller, *supra*, at 169.

2. It follows from Rule 44.1's characterization of foreign law determinations as questions of law rather than of fact that federal courts cannot treat a party's failure to substantiate foreign law as an *evidentiary* failure that warrants terminating claims. This fulfills Rule 44.1's objective of equating determinations of foreign and domestic law. "When the law to be applied is domestic law, courts today do not look at the underlying substantive legal requirements as elements of proof." Teitz, *supra*, at 99. With Rule 44.1, the same is true of foreign law. "Despite the siren call of countless cases applying burden-of-proof notions to a failure of foreign law proof, the rejection of the fact characterization of alien law by Federal Rule 44.1 makes it clear that under the new federal practice the failure-of-proof problem does not involve burdens of production and

persuasion in any classical sense." Miller, *supra*, at 698.[6] Put simply, "Rule 44.1 does not pivot on the concept of party responsibility." *Id.* at 729.

For example, in *Twohy* v. *First National Bank*, 758 F.2d 1185 (7th Cir. 1985), the court confronted whether a shareholder could sue for injury to a corporation under Spanish law. The plaintiff's experts "never directly responded to the defendant's challenge to [plaintiff's] right to maintain an action." *Id.* at 1192. The court observed: "If we were to apply pre-1966 law, where questions of foreign law were viewed as issues of fact, with the party relying on foreign law carrying the burden of proof, the lower court's dismissal could be affirmed solely because of plaintiff's failure to carry his burden of proof. The adoption of Rule 44.1 in 1966, however, substantially changed the manner in which federal courts are to treat questions of foreign law." *Id.* at 1192. Under Rule 44.1, the court of appeals held, the district court "was correct in *not* dismissing plaintiff's claim merely because [plaintiff] had failed to establish relevant controlling Spanish law." *Id.* at 1193 (emphasis added). The court reasoned: "'It simply is not fair to bar a party from recovering when neither his attorney nor the court is able to conjure up the content of governing law.'" *Id.* at 1194 (quoting 9 Wright & Miller, *Federal Practice and Procedure* § 2447, 416 (1995)).

3. The Second Circuit in the decision below failed to heed these lessons. In contrast to and in conflict with the Seventh

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[6] *See, e.g.*, Teitz, *supra*, at 104. Rule 44.1 does not preclude allocating certain burdens of production. Indeed, Rule 44.1's requirement that a party seeking to raise a foreign law issue provide notice imposes a form of a burden of production. But what Rule 44.1 does not permit, yet what the Second Circuit did here, is impose an evidentiary burden of *persuasion* in determining foreign law.

Circuit, the Second Circuit rejected FinOne's defense based on the Thai Finance Ministry's order because FinOne purportedly failed "definitively" to substantiate Thai Law. The Second Circuit thus improperly "appl[ied] pre-1966 law, where questions of foreign law were viewed as issues of fact, with the party relying on foreign law carrying the burden of proof," and held against FinOne "solely because [of FinOne's supposed] failure to carry [its] burden of proof." *Twohy*, 758 F.2d at 1192; *see also* Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 Am. J. Comp. L. 581, 584 (1995) ("It appears that some federal courts still have not gotten the word" that under Rule 44.1 "decisions on foreign law are specifically designated as rulings of law" and improperly "continue to impose upon the parties a factual burden of proof of foreign law").

Indeed, the Second Circuit's error "may well be of due-process dimensions," Miller, *supra*, at 662 n.188, because of the catch-22 in which the court placed FinOne. As explained, neither FinOne nor LBSF framed the critical legal issue – whether the Thai Finance Ministry's orders provided a defense to setoff under Section 344 of the Thai Code – as turning on whether those orders would provide a defense in hypothetical civil litigation between the parties seeking payment on the Bills. The Second Circuit framed the issue in these terms only when it published its opinion; consequently, neither party had reason to brief the legal issue the Second Circuit *sua sponte* deemed dispositive. After recasting the issue *sua sponte*, the Second Circuit then held against FinOne solely because the materials FinOne submitted failed definitely to answer the legal issue the court posed.

In other words, the court imposed on FinOne an evidentiary burden of persuasion yet denied FinOne any opportunity to meet that burden because the court raised the issue *sua*

sponte. Had the Second Circuit availed itself of one of several legitimate courses open to it under Rule 44.1, such as calling for further briefing from the parties on a newly-identified legal issue (*see infra* p. 27), the court would have avoided this due-process-depriving catch-22. By instead treating the effect of the Thai Ministry's orders on LBSF's setoff as a matter that FinOne had to substantiate or forfeit its claim, the court not only transgressed Rule 44.1, but likely also violated FinOne's due process rights.

B. The Second Circuit's Illogical and Unfair Rule of Forfeiture When Foreign Law Is Not Definitively Substantiated Conflicts With The Prevailing Rule In Numerous Courts of Appeals

As the contrast between the Seventh Circuit's decision in *Twohy* and the decision below demonstrates, the Second Circuit not only defied Rule 44.1, but also deepened an enduring split among the courts of appeals on the proper procedure under Rule 44.1 when available materials do not demonstrate the content of foreign law. This Court should grant review and clarify that, even if a federal court has a range of legitimate options on how to proceed when foreign law is not adequately substantiated, a court may not treat foreign law as a question of fact and terminate claims for failure to demonstrate the law's content. The Court should abrogate the Second Circuit's illogical and due-process-depriving doctrine, one that governs the courts in which many important international disputes are heard, that a party who fails to substantiate foreign law (even when that issue is raised *sua sponte*) faces dismissal but a party who makes no attempt to demonstrate foreign law may nonetheless prevail.

1. "There has been much diversity of opinion among the federal courts about the consequences of a failure to establish the content of foreign law." 9 Wright & Miller, *Federal*

Practice and Procedure: Civil 2d § 2447, at 658 (1995); *see also Carey* v. *Bahama Cruise Lines*, 864 F.2d 201, 205 (1st Cir. 1988) (describing competing approaches). The majority approach is that "the law of the forum should apply when foreign law is not proved." *In re Avantel*, 343 F.3d 311, 322 (5th Cir. 2003); *see also Bel-Ray Co.* v. *Chemrite (Pty) Ltd.*, 181 F.3d 435, 440-41 (3d Cir. 1999); *Phillips USA* v. *Allfex USA, Inc.*, 77 F.3d 354, 360 (10th Cir. 1996).[7] Courts apply forum law on the ground that (i) it is the only law before the court (that is, based on choice-of-law theory), *see, e.g.*, *Seguros*, 347 F.2d at 175, (ii) the parties effectively acquiesced to local law, *see, e.g.*, *Interpool Ltd.* v. *Char Yigh Marine*, 890 F.2d 1453, 1458 (9th Cir. 1989) ("Where no authority, or insufficient authority, is presented by the parties about foreign law, a court may conclude that the parties have acquiesced in the application of the law of the forum."), or (iii) foreign law is presumed like local law, *see, e.g.*, *Phillips*, 77 F.3d at 360 ("The record reflects no definite showing as to Australian res judicata law; therefore, we assume that Australian res judicata principles are similar to those of Kansas.").

A variant of this approach, articulated in the Restatement, is that the law of the forum (in this case, the law of New York) determines the consequences of a failure to demonstrate foreign law. *See Restatement (2d) Conflict of Laws* § 136(2) & Cmt. g.

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[7] *See also Banco de Credito Indus.* v. *Tesoreria Gen.*, 990 F.2d 827, 836 (5th Cir. 1993) ("When the parties have failed to conclusively establish foreign law, a court is entitled to look to its own forum's law in order to fill in any gaps."); *Seguros Tepeyac, S.A.* v *Bostrom*, 347 F.2d 168, 175 n.3 (5th Cir. 1965) (Wisdom, J.) (stating that "modern commentators are more or less in general agreement that the law of the forum should apply when foreign law is not proved" and holding that "[t]o the extent therefore that the content of Mexican law may be considered applicable but not proved, the trial judge correctly applied the law of the forum").

Under the Restatement, "where either no information, *or else insufficient information*, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law" because "in this way it can best do justice to the parties." *Id.* Cmt. h (emphasis added). *See, e.g., Commercial Ins. Co. of Newark* v. *Pacific-Peru Constr. Cop.*, 558 F.2d 948, 952 (9th Cir. 1977) (following Restatement); *Mutual Serv. Ins. Co.* v. *Frit Indus., Inc.*, 358 F.3d 1312, 1321-22 (11th Cir. 2004) (same); *Bel-Ray*, 181 F.3d at 440-41 (citing Restatement).

Still another approach, one favored by many commentators and supported by Rule 44.1's language and purpose, is that a federal court, at least in some circumstances, must determine the content of foreign law as best it can, even if the materials submitted by the parties do not establish that law's content. *See* Miner, *supra*, at 583 ("My own view of the matter is that a court has the affirmative obligation to seek out the applicable foreign law whether the parties have established that law or not."); Teitz, *supra*, at 98, 113 (same). For example, in *Twohy* v. *First Nat'l Bank*, 758 F.2d 1185 (7th Cir. 1985), discussed above, the district court held that the plaintiff lacked a right to sue under Spanish law based on conclusory presentations by the parties. The court of appeals was not "convinced that the district court fully met its duty to ascertain foreign law under Rule 44.1." *Id.* at 1193. Rule 44.1 did not require the "judge to engage in private research." *Id.* But "[u]nder these circumstances" it "would have been appropriate for the court to demand a more 'complete presentation by counsel'" on the pertinent issue of Spanish law. *Id.* And "if the district court had decided not to request a more detailed presentation by counsel, before plaintiff's complaint properly could be dismissed. *Rule 44.1 required a deeper inquiry into the law of Spain than that undertaken by the court below.*" *Id.* at 1194 (emphasis added).

2. The Second Circuit here followed none of these approaches. Instead of applying forum law (New York), asking for supplemental presentations of counsel, or undertaking the "deeper inquiry" into Thai law that "Rule 44.1 required," the Second Circuit ruled against FinOne on the merits for failing to meet an evidentiary burden of proof. The Second Circuit thus followed precisely the course that, as *Twohy* explains, Rule 44.1 forbids and is endorsed by *none* of the other approaches employed by other courts of appeals.

The Second Circuit's rule that a party faces dismissal for insufficient "proof" of foreign law is not just anachronistic, contrary to Rule 44.1, and in conflict with the approaches undertaken by other courts of appeals. The Second Circuit's rule is also illogical and unfair. In the Second Circuit, a party who fails to invoke foreign law or provides no proof under it is entitled to have its claims decided under forum law. *See Vishipco Line* v. *Chase Manhattan Bank*, 660 F.2d 854, 860 (2d Cir. 1981) (holding that parties' "failure to invoke foreign law with respect to the underlying obligations themselves would not mandate dismissal of the claims" when defendant raised foreign law only in connection with "its own affirmative defenses" and applying forum law to the underlying obligations); *Bartsch* v. *MGM, Inc.*, 391 F.2d 150, 155 n.3 (2d Cir. 1968) (applying New York rather than German law when "neither party has suggested that German law differs from New York law in any relevant respect").

By contrast, if a party in the Second Circuit seeks to demonstrate foreign law but does not supply "definitive[]" proof, its claims will be dismissed – even when, as here, the lack of "definitive[]" proof is a consequence of the court raising an issue of foreign law *sua sponte* and then not asking for supplemental briefing on that issue. Pet. App. 33a. Permitting parties who fail to invoke (or minimally invoke) foreign law to

prove their claims under domestic law yet terminating claims for failure to substantiate foreign law *definitively* when they make the effort is inexplicable. "It simply is not fair to bar a party from recovering when neither his attorney nor the court is able to conjure up the content of governing law. To speak of a failure of proof or to assume that the party has no rights under the controlling law in these circumstances is inapposite." 9 Wright & Miller, *supra*, § 2447, at 660.

The Second Circuit's flawed rule is also likely to deter parties from raising foreign law, for fear that failure to demonstrate foreign law's content "definitively" will lead to an adverse judgment. This is contrary to Rule 44.1's "philosophy that federal courts should ascertain foreign law accurately whenever possible." Miller, *supra*, at 728. And, as with the Second Circuit's improper refusal to defer to the Thai courts' own interpretation of Thai law, it would also promote forum shopping and undermine comity. A litigant whose case depends critically on interpreting foreign law may seek to avoid the Second Circuit and its rule of forfeiture for failure to substantiate definitely foreign law even when the courts of that circuit are most convenient for the parties and witnesses. Moreover, to require definitive proof of a foreign nation's law may undermine that nation's policies and create international friction. This case vividly illustrates such consequences from ignoring Rule 44.1. By rejecting FinOne's defense and permitting the very setoff the Thai Finance Ministry's order precluded, the Second Circuit advantaged one creditor over another, thereby nullifying an important component of Thailand's response to the catastrophic economic meltdown that it confronted in the late 1990s.

3. This Court need not resolve in this case all aspects of the multi-faceted split among the circuits described above on the proper course when the content of foreign law is not

adequately substantiated. The Court need only hold, to answer the second question presented, that it contravenes Rule 44.1 to treat the parties' failure to substantiate foreign law definitely as failure to meet an evidentiary burden that warrants terminating claims. The Court can leave for remand whether the court of appeals should call for further briefing on the issue of foreign law it raised *sua sponte*, default to forum law, or some other course consistent with Rule 44.1. This disposition would resolve an important aspect of the circuit split and lay the groundwork for directed percolation of the remaining issues among the federal courts of appeals.[8]

III. THE PROCEDURE FOR DETERMINING FOREIGN LAW PRESENTS AN IMPORTANT FREQUENT AND RECURRING ISSUE THAT IS RIPE FOR CLARIFICATION

Providing such further direction to the federal courts on the proper procedures for determining the content of foreign law is urgently needed. As Judge Miner has written: "The global economy has brought an increasing variety of foreign law issues to the federal courts." Miner, *supra*, at 581. "Increasing globalization has resulted in the burgeoning of transnational disputes in our courts, with the attendant need to address the content of relevant foreign law." Teitz, *supra*, at 97.

Despite the increasing importance of foreign law determinations by the federal courts, and the correspondingly greater

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[8] Were the Court to grant the petition on either question presented and rule in FinOne's favor, FinOne would have available a defense that, on remand, would enable FinOne to prevail on its cross appeal that any setoff by LBSF should be disallowed. Moreover, ruling in FinOne's favor on the first question presented would require the court of appeals to order judgment entered for FinOne as a matter of law.

need to maintain international comity by making accurate foreign law determinations, this Court has never addressed Rule 44.1's requirements or, since its enactment, elaborated on the appropriate principles for determining foreign law's content. A consequence, as explained, is confusion among the lower courts of comity's requirements and a diversity of approaches as to the proper procedure for deciding foreign law issues when the materials before the court provide no definitive answer.

The Second Circuit's continuing confusion over the requirements of comity and Rule 44.1 is particularly troublesome and warrants this Court's intervention. The district courts within the Second Circuit handle many of the disputes involving foreign law entertained by American courts.[9] The Second Circuit's treatment of foreign law determinations thus has especially significant ramifications for international comity and commerce. The Second Circuit's bizarre rule, under which a party faces forfeiture of claims for failure to substantiate foreign law definitively but may prevail under forum law if it avoids seeking to prove foreign law, accordingly threatens significant

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[9] Examples of such cases from the last few years, in addition to this case, include *Zhu* v. *First Atl. Bank*, 2005 U.S. Dist. LEXIS 24895 (S.D.N.Y. Oct. 25, 2005) (Nigerian law); *Kim* v. *Co-operative Centrale Raiffeisen-Boerenleenbank B.A.*, 364 F. Supp. 2d 346 (S.D.N.Y. 2005) (Singapore law); *Republic of Ecuador* v. *ChevronTexaco Corp.*, 376 F. Supp. 2d 334 (S.D.N.Y. 2005) (Ecuadorian law); *Weiss* v. *La Suisse, Societe d'Assurances Sur La Vie*, 293 F. Supp .2d 397 (S.D.N.Y. 2003) (Swiss law); *Korea Life Ins. Co.* v. *Morgan Guaranty Trust Co.*, 269 F. Supp. 2d 424 (S.D.N.Y. 2003) (Korean law); *Films by Jove, Inc.* v. *Berov*, 250 F. Supp. 2d 156 (E.D.N.Y. 2003) (Russian law); *Guidi* v. *Inter-Continental Hotels Corp.*, 2003 U.S. Dist. LEXIS 6390 (S.D.N.Y. Apr. 16, 2003) (Egyptian law); *Jung* v. *Neschis*, 2003 U.S. Dist. LEXIS 5569 (S.D.N.Y. Apr. 7, 2003) (Liechstenstinian law); *Akro Investicni Spolecnost* v. *A.B. Watley*, 2003 U.S. Dist. LEXIS 3478 (S.D.N.Y. Mar. 12, 2003) (Czech law).

mischief. So too does the confusion within the Second Circuit on the deference to accord court decisions issued by a civil law jurisdiction.

This case demonstrates why guidance from this Court on these two frequent and recurring issues in determining foreign law is now necessary. By ignoring Thai law in defiance of comity-based interpretive principles, and treating an issue of Thai law as subject to an evidentiary burden of proof in violation of Rule 44.1, the Second Circuit dismantled an important aspect of the economic policies of an important U.S. trading partner and nullified that nation's decrees. Countenancing such outcomes risks retaliation against U.S. interests abroad by foreign courts. Granting the petition, correcting these errors, and providing guidance to the federal courts on two narrow but important aspects of the procedures for determining foreign law, will promote accurate determinations of foreign law, encourage reciprocity, and promote comity's central goals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 23, 2006

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2004

(Argued: November 8, 2004 Decided: July 12, 2005)

Docket Nos. 03-9049(L), 03-9096(XAP)

FINANCE ONE PUBLIC COMPANY LIMITED,

Plaintiff-Appellee-Cross-Appellant,

—v.—

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Defendant-Appellant-Cross-Appellee,

SOMPONG SUCHARITKUL, Dr.,

Special Master.[1]

Before:

WALKER, *Chief Judge,*
POOLER and WESLEY, *Circuit Judges.*

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[1] The official caption currently lists the special master before the parties. The Clerk of Court is instructed to alter the official caption to conform to that appearing here.

Cross-appeals from a judgment entered September 8, 2003, in the United States District Court for the Southern District of New York (Constance Baker Motley, *Judge*), awarding plaintiff damages of $5,351,032.66 plus pre- and post-judgment interest for breach of contract.

Reversed and remanded to enter judgment for defendant.

SCOTT E. ECKAS, King & Spalding LLP (Jeffrey Q. Smith and Jennifer L. Hurley, on the brief), New York, NY, for *Defendant-Appellant-Cross-Appellee*.

AARON RUBINSTEIN, Kaye Scholer LLP (Michael M. Pomerantz and Carly Henek, on the brief), New York, NY, for *Plaintiff-Appellee-Cross-Appellant*.

Michael S. Feldberg and Joshua D. Cohn, Allen & Overy LLP, New York, NY, for *Amicus Curiae* International Swaps and Derivatives Association.

POOLER, *Circuit Judge*:

BACKGROUND

This is a contract dispute in diversity between a Thai company and a Delaware corporation. Plaintiff-appellee-cross-appellant Finance One Public Company Ltd. ("Finance One"), a now-defunct publicly traded Thai corporation with its principal place of business in Bangkok, was once the largest financial company in

Thailand. Defendant-appellant-cross-appellee Lehman Brothers Special Financing, Inc. ("LBSF"), a Delaware corporation with its principal place of business in New York, is part of the Lehman Brothers family of companies, and is used as Lehman Brothers' global vehicle for derivatives transactions. In 1995, LBSF and Finance One entered into a derivatives trading relationship.

The International Swaps and Derivatives Association ("ISDA"), the principal industry association of the derivatives industry, publishes a standard form contract known as the "Master Agreement," which is the industry standard in general use worldwide for formalizing derivatives trading arrangements.[2] The Master Agreement[3] consists of 18 pages of terms uniform across contracts, and calls for parties to attach a "Schedule" containing other terms individually tailored to their particular relationship. The Master Agreement contains a choice-of-law clause directing parties to specify governing law in the Schedule. It contains a forum-selection clause requiring parties to submit to the jurisdiction of either English or New York courts if the Schedule selects English or New York law, respectively, to govern the agreement. LBSF and Finance One executed a contract consisting of the Master Agreement and an attached Schedule on June 30, 1995. In the Schedule, the parties chose New York law as the "governing law." Individual transactions were to be documented in "Confirmations" whose form was specified in the Schedule.

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[2] The ISDA appears here as *amicus curiae*, arguing for modification of the district court's interest award.

[3] References herein to the Master Agreement are to the 1992 version published by the ISDA.

In 1995 and 1996, LBSF and Finance One entered into four derivatives transactions. The parties entered into interest-rate and currency swap transactions on July 7, 1995, January 12, 1996, and October 24, 1996. On February 28, 1996, another Lehman company entered into a currency option transaction with Finance One that it subsequently assigned, with the consent of Finance One, to LBSF effective April 26, 1996. Each of the swap transactions, and assignment of the currency option transaction, was negotiated by Finance One representatives in Bangkok and LBSF representatives in Tokyo or Hong Kong, and was listed in LBSF records as originating in the Tokyo or Hong Kong offices of LBSF. The Confirmations were mailed from LBSF's New York headquarters.

In September and October 1996, Finance One issued seven bills of exchange, with a total face value of 175,000,000 Thai baht, to Lehman Brothers (Thailand), Ltd. ("LBT"), a Thai company with its principal place of business in Bangkok, and another member of the Lehman family. These bills were Thai baht-denominated negotiable debt instruments with a one year term to maturity. In March 1997 LBT purchased from a third party an additional five bills of exchange issued by Finance One, with a total face value of 130,000,000 Thai baht and a maturity date of January 12, 1998.

In 1996 Thailand, like much of southeast Asia, entered the throes of a financial crisis. The Thai Ministry of Finance intervened in an attempt to mitigate the damage to the country's financial sector, ultimately issuing an order on June 26, 1997, suspending business operations of Finance One for thirty days. On June 24 or 25, 1997, before the Ministry of Finance order was issued, representatives of LBT and LBSF had negotiated the transfer of the 12 bills of exchange

to LBSF. In return for transferring the bills to LBSF, LBT received a credit on inter-company accounts in the amount of the value at which the bills had been carried on LBT's books. The bills were endorsed over to LBSF by their custodian, Bangkok Bank, on June 27, 1997, pursuant to authorization from LBT.

On July 25, representatives from LBSF's Hong Kong and Tokyo offices visited Finance One's Bangkok office to propose that Finance One allow LBSF to set off the face value of the bills of exchange against LBSF's derivatives obligations, offering Finance One a $1 million bonus to seal the deal. Finance One rejected the offer, stating that payment of the bills was prohibited by the Ministry of Finance's June order. That same day, a Lehman representative wrote to Finance One terminating the four derivatives transactions "in accordance with the terms of the Confirmations relating to such Transactions." Also that same day, an LBSF representative presented the bills for payment at Finance One's Bangkok office, was refused, and filed a customary "notice of dishonor and protest" with the Royal Thai Police Department. The Ministry of Finance issued another order dated July 25, 1997, extending Finance One's suspension indefinitely.

By letter dated July 29, 1997, LBSF notified Finance One that it had calculated the aggregate amount LBSF owed to Finance One under the derivative transactions as $9,664,204, and was setting off against this amount the value of the bills, which was $9,651,898.73, leaving a balance of $12,305.27 in Finance One's favor, which LBSF paid. On December 8, 1997, Finance One ceased operations entirely and was placed under the supervision of the newly created Financial

Sector Restructuring Authority to wind up its affairs, liquidate its assets, and pay off its creditors.

On September 7, 2000, Finance One commenced this lawsuit, in which it seeks $9,651,898.73 in damages for breach of contract and breach of the duty of good faith and fair dealing based on LBSF's failure to pay the entirety of its derivatives obligation. After discovery was completed, both parties declared their intention to move for summary judgment at a status conference in September 2001. Because the parties disagreed about the applicable law, LBSF asserting that New York law applied and Finance One that Thai law applied, the district court ordered a preliminary round of briefing on the choice-of-law issues. By memorandum opinion and order filed December 4, 2001, the district court found that to the extent that LBSF argued that its setoff right was created by the Master Agreement, this issue would be governed by New York law in accord with the Master Agreement's choice-of-law clause, but in the event that LBSF had to rely on other sources of law, the court was not prepared to decide which jurisdiction's law governed the question whether an "extra-contractual setoff right [existed] by operation of law." *Finance One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, No. 00 Civ. 6739, 2001 WL 1543820, at *2, 2001 U.S. Dist. LEXIS 19923, at *6 (S.D.N.Y. Dec. 4, 2001). Finding the parties' briefing inadequate to resolve how New York courts would answer this choice-of-law question, the court ordered the parties to submit supplemental briefs addressing the outstanding choice-of-law issues. By opinion and order filed August 9, 2002, the court held that the Master Agreement did not itself either confer a setoff right or prohibit setoff, and that Thai law governed the existence or nonexistence of an extra-contractual

setoff right. Finding it impossible to decide which party's experts on Thai law to credit, the court ordered that the parties submit lists of proposed special masters to identify and apply Thai law. *See Finance One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 215 F. Supp. 2d 395, 402-403 (S.D.N.Y. 2002). The parties submitted their lists and objections, and the court appointed Dr. Sompong Sucharitkul, a professor at the Golden Gate University School of Law, as Special Master.

The Special Master submitted a report on January 17, 2003. The parties differ in their characterization of the report, Finance One characterizing it as finding no right to setoff under Thai law, but nevertheless going on to create one based on the Master's view of the equities, and LBSF characterizing it as finding an absolute right to setoff under Thai law, but nevertheless going on to limit it based on the Master's view of the equities. In fact, the Master clearly recognized the existence of a statutory right to setoff under Section 341 of the Thai Civil and Commercial Code. However, noting that it was unclear whether LBSF satisfied the statute's requirement that it be a bona fide purchaser for value, the Master recommended that the court "apply the law of [Thailand] as if the Court were to sit in judgment as a national court on site," exercising "all the judicial discretion pertaining to Thai Justices *in simile casu*." He explained that "LBSF could be deemed to have a right to set-off which is not unqualified . . . a Thai court could exercise its judicial discretion in an equitable manner. . . . It would be for the Trial Judge to assess the residual value or the market value of the 12 Bills of Exchange in question for purposes of set-off." The Master then proposed a means of valuation: in order to ensure that LBSF was treated with the same priority as any other Finance

One creditor, LBSF would receive a proportion of the bills' face value equal to Finance One's ratio of assets to liabilities, or 44.4%. The Master stated that by this solution, "justice would be better served than either of the two extremes . . . ."

In response to the court's request for clarification, the Master submitted a Supplemental Report on April 3, 2003. The Master reiterated that a statutory right to setoff existed, but explained that the bare right to setoff was not conclusive of the value that LBSF was entitled to set off, and stated that his proposed solution was "authorized by Thai law" in order to further Thailand's policy of protecting creditors.

By memorandum opinion and order filed May 1, 2003, the district court accepted the Special Master's recommendation, calculated the precise amount of the setoff, yielding a figure of $4,300,866.07, and held that Finance One was entitled to the balance of the outstanding derivatives obligation as damages. *Finance One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, No. 00 Civ. 6739, 2003 WL 2006598, 2003 U.S. Dist. LEXIS 7269 (S.D.N.Y. May 1, 2003). On May 13, 2003, the court ordered briefing on the applicable rates of pre- and post-judgment interest. By memorandum opinion and order filed July 11, 2003, the court found the appropriate rates to be 17.04% for pre- and 18.04% for post-judgment interest. *Finance One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, No. 00 Civ. 6739, 2003 WL 21638214, 2003 U.S. Dist. LEXIS 11784 (S.D.N.Y. July 11, 2003). Judgment was entered to that effect on July 17, 2003.

On July 31, 2003, Finance One moved for clarification and correction of the judgment under Fed. R. Civ. P. 60(a), and LBSF moved to reconsider, alter, or amend, under Fed. R. Civ. P. 59(e) and 60(b). The

court denied LBSF's motion on the grounds that it was untimely, and that it sought to relitigate issues already considered and rejected and to raise new issues. The court granted Finance One's motion, entering judgment with amended rates of interest. *Finance One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, No. 00 Civ. 6739, 2003 WL 22056983, 2003 U.S. Dist. LEXIS 15265 (S.D.N.Y. Sep. 4, 2003).

Both parties timely appealed, Finance One claiming that no right to setoff existed and it was entitled to payment in full, and LBSF claiming that it was entitled to its original setoff of the full face value of the bills, and so had no further obligations to Finance One. LBSF additionally challenged the district court's calculation of the rates of pre- and post-judgment interest. We affirm the district court's determination that Thai law governs LBSF's claimed setoff right, but, finding LBSF entitled to setoff under Thai law, we reverse the judgment entered for Finance One and order that judgment be entered for LBSF. We therefore need not reach the interest-rate issue.

DISCUSSION

I. Choice of Law

We review the district court's choice of law *de novo*. *Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir. 1998). As jurisdiction is grounded in diversity, we apply the forum state's choice-of-law rules. *Id.* at 12. LBSF argues that New York law should be applied to the question of its setoff rights, on three grounds. First, LBSF argues that before applying non-forum law, a court is required to find as a threshold matter that the differences between the two jurisdictions' rules would be "outcome determinative." Second, LBSF argues that

the setoff issue falls within the scope of the choice-of-law provisions in the Master Agreement and accompanying Schedule, which select New York law. Third, LBSF argues that under New York's "interest analysis," New York courts would apply New York law to the setoff question.

A. Material Conflict

LBSF argues that because Finance One has alleged that the outcome under either Thai law or New York law would be the same—the setoff would be barred and Finance One would receive the whole of LBSF's outstanding derivatives obligation as damages—Finance One therefore fails to allege a "material conflict" between the two jurisdictions' rules and is thus precluded from seeking the application of non-forum law.

LBSF is correct that we would not have occasion to embark on a choice-of-law analysis in the absence of an "actual conflict" between the applicable rules of two relevant jurisdictions. *See In re Allstate Ins. Co.*, 597 N.Y.S.2d 904, 905 (1993). However, LBSF's argument hinges on its assumption, unsupported by any authority, that "actual conflict" exists only where the choice of which rule to apply has been demonstrated to be "outcome determinative." This assumption is incorrect. Rather, the requirement is that "the applicable law from each jurisdiction provides different substantive rules . . . ." *Curley*, 153 F.3d at 12. The differences must be "relevant" to the issue at hand, *Tronlone v. Lac d'Amiante du Quebec, Ltee.*, 747 N.Y.S.2d 79, 80 (App. Div. 1st Dep't 2002), and must have a "significant *possible* effect on the outcome of the trial," *Simon v. Philip Morris, Inc.*, 124 F. Supp. 2d 46, 71 (E.D.N.Y. 2000) (emphasis added). But a party seeking application of non-forum law is not required,

as LBSF implies, to demonstrate that its case would be lost were the court to apply forum law. Such a requirement would be absurd, and so it is no surprise that LBSF cites no authority that supports it. Rather, LBSF relies solely on cases holding that where *the court* has determined that the result would be the same under either jurisdiction's law, it need not decide which to apply. *See, e.g., Commercial Union Ins. Co. v. Flagship Marine Servs., Inc.*, 190 F.3d 26, 30 (2d Cir. 1999). This is a very different, and quite unremarkable, proposition. Naturally a court need not decide issues whose resolution it has determined can have no possible effect on the ultimate disposition of the case. This does not imply, however, that before embarking on a choice-of-law analysis a court must apply the relevant substantive rules of each jurisdiction to the facts of the case and determine what the various results would be and whether they would differ.

Finance One identifies a number of provisions of Thai substantive law that are potentially decisive and that have no New York law equivalent: the legal effect to be given to the Thai Finance Ministry's orders; Thai case law holding conduct allegedly similar to LBSF's to be in bad faith as a matter of law; various alleged requirements before the bills could be validly transferred under Thai law; significant differences between the New York and Thai statutes governing setoff, with the Thai statute imposing a number of requirements not found in the New York statute; and a Thai public policy of treating similarly situated creditors equally. These are certainly relevant substantive differences that could have a significant impact on the outcome of the case. This is all that Finance One is required to demonstrate in order to invoke a choice-of-law analysis.

B. The Master Agreement Choice-of-Law and Forum-Selection Clauses

Paragraph 13 of the Master Agreement provides:

> 13. Governing Law and Jurisdiction
>
> (a) *Governing Law.* This Agreement will be governed by and construed in accordance with the law specified in the Schedule.
>
> (b) *Jurisdiction.* With respect to any suit, action or proceedings relating to this Agreement ("Proceedings"), each party irrevocably:—
>
> > (i) submits to the jurisdiction of the English courts, if this Agreement is expressed to be governed by English law, or to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City, if this Agreement is expressed to be governed by the laws of the State of New York . . . .

The attached Schedule provides:

> (h) Governing Law. This Agreement will be governed by and construed in accordance with the laws of the State of New York (without reference to choice of law doctrine).

LBSF argues that the choice-of-law clause, in light of the forum-selection clause, is sufficiently broad to require that New York law be applied to LBSF's setoff claim. The effect of the choice-of-law clause depends on both its validity and its scope.

The validity of a contractual choice-of-law clause is a threshold question that must be decided not under the law specified in the clause, but under the relevant forum's choice-of-law rules governing the effectiveness of such clauses. *See, e.g., Valley Juice Ltd. v. Evian Waters of France, Inc.*, 87 F.3d 604, 607-08 (2d Cir. 1996) (in diversity case transferred from Massachusetts federal district court, applying Massachusetts law to determine validity of contractual choice-of-law clause specifying that New York law governed contract). In this case, neither party disputes the validity of the choice-of-law clause; instead, they differ over its scope.

Determining which jurisdiction's law governs the scope of a valid choice-of-law clause is not a simple matter. On the one hand, once a court finds that a contractual choice-of-law clause is valid, the law selected in the clause dictates how the contract's provisions should be interpreted, and so arguably that law should also dictate how the choice-of-law clause —which is itself one of the contract's provisions —should be interpreted. *See Odin Shipping Ltd. v. Drive Ocean V MV*, 221 F.3d 1348 (Table), 2000 WL 576436, at *1, 2001 U.S. App. LEXIS 11098, at *3 (9th Cir. May 11, 2000) (unpublished) ("The *scope* of [a choice-of-law] provision is a matter of contract construction and interpretation, however, which would in turn be governed by the law selected in the choice-of-law provision."). More commonly, however, courts consider the scope of a contractual choice-of-law clause to be a threshold question like the clause's validity. Courts therefore determine a choice-of-law clause's scope under the same law that governs the clause's validity—the law of the forum. *See, e.g., Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996)

(applying New York law to interpret scope of choice-of-law clause that selected Massachusetts law); *Maltz v. Union Carbide Chems. & Plastics Co.*, 992 F. Supp. 286, 296 (S.D.N.Y. 1997) (in diversity case transferred from Texas federal district court, applying Texas law to determine scope of choice-of-law clause that specified New York law); *cf. Hodom v. Stearns*, 301 N.Y.S.2d 146, 148 (App. Div. 4th Dep't 1969) (applying New York law to interpret scope of forum-selection clause specifying that suits under contract be brought in Oregon courts). Different states may approach the question of what law governs the scope of a choice-of-law clause in different ways—in State A, the law selected in the choice-of-law clause might govern that clause's scope, while in State B, forum law, which governs the clause's validity, might also govern the scope. Finally, parties could—though they rarely do—specify in the choice-of-law clause itself what law should govern questions about the clause's scope.

The district court in this case, sitting in diversity, was bound to apply New York law to determine the scope of the contractual choice-of-law clause. New York courts decide the scope of such clauses under New York law, not under the law selected by the clause, which here also happens to be New York law. *See J.A.O. - Acquisition Corp. v. Stavitsky*, 745 N.Y.S.2d 634, 638 (Sup. Ct. N.Y. County 2001) (applying New York law to determine scope of choice-of-law clause that selected New Jersey law). LBSF argues that under New York law as explained in *Turtur v. Rothschild Registry International, Inc.*, 26 F.3d 304 (2d Cir. 1994), the choice-of-law clause in the Schedule, in light of the forum-selection clause in the Master Agreement, is broad enough to encompass setoff rights

arising from sources, like the bills of exchange, outside of the contract.

LBSF's appeal to *Turtur* is unavailing, for a simple reason: the court in *Turtur* did not apply New York law to determine the scope of the contractual choice-of-law clause at issue in that case, it applied Texas law. The underlying dispute in *Turtur* began in Texas state court and was removed to the United States District Court for the Southern District of Texas. *Id.* at 306. Five years later, after all defendants except a New Jersey-based law firm had been dismissed, the case was transferred to the Southern District of New York. *Id.* The transfer was ordered not because venue was improper in the Texas federal district court, but rather for the convenience of the parties and witnesses pursuant to 28 U.S.C. § 1404(a). Appellants' Br. at 1, *Turtur* (No. 93-7966), *available at* 1993 WL 13011829. Following such a transfer, "the transferee court must follow the choice-of-law rules that prevailed in the transferor court." *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990). The transferor court in *Turtur* was a Texas federal district court, and the Second Circuit, in reviewing the New York federal district court's decision, was bound to—and did—apply Texas's choice-of-law rules to determine the validity and scope of the contractual choice-of-law clause at issue.

Although the discussion of this issue in *Turtur* was limited, the court focused primarily on distinguishing a Texas state case, 26 F.3d at 309, and concluded that "[w]e agree with the Texas district court, which originally ruled on this issue," as to the scope of the choice-of-law clause in dispute. *Id.* at 310. By stating that "both New York and Texas recognize the right of contracting parties to agree to choice of law" and citing one Texas and one New York case, *id.*, *Turtur*

obscured which state's law dictated the validity and scope of the choice-of-law clause at issue. And because the choice-of-law clause at issue selected New York law, it is understandable that subsequent courts—failing to distinguish between the law governing a choice-of-law clause's scope and the law selected by the clause —have read *Turtur* as applying New York law governing the scope of choice-of-law clauses. *See, e.g.*, *Krock*, 97 F.3d at 645;[4] *Bibeault v. Advanced Health Corp.*, No. 97 Civ. 6026, 1999 WL 301691, at *6, 1999 U.S. Dist. LEXIS 7173, at *17-*18 (S.D.N.Y. May 12, 1999). Nevertheless, *Turtur* is better read as having applied Texas law to determine the validity and scope of the contractual choice-of-law clause at issue. As authority for New York law, therefore, *Turtur* is irrelevant to this case, except to the extent that its reasoning is persuasive and consistent with governing New York law.

We turn, therefore, to the leading New York case on the scope of choice-of-law clauses, *Knieriemen v. Bache Halsey Stuart Shields Inc.*, 427 N.Y.S.2d 10 (App. Div. 1st Dep't 1980), *overruled on other grounds*, *Rescildo v. R.H. Macy's*, 594 N.Y.S.2d 139 (App. Div. 1st Dep't 1993). *Knieriemen* involved a contract between a New Orleans brokerage firm and a customer that contained a choice-of-law clause that "recited that '[t]his contract shall be governed by the

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[4] *Krock* assumed, without discussion, that *Turtur* stood for New York law on the scope of choice-of-law clauses. 97 F.3d at 645. Because this assumption was not a holding of *Krock*, this circuit's rule that a prior panel decision is binding "until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*," *United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986), does not prevent us from revisiting *Krock*'s interpretation of *Turtur*.

laws of the State of New York.' " 427 N.Y.S.2d at 12 (brackets in original). The broker lost a substantial amount of the customer's money, and the customer sued for fraud, breach of contract, negligence, and churning. The court held that the contractual choice-of-law clause did not reach tort claims: "That the parties agreed that their contract should be governed by an expressed procedure does not bind them as to causes of action sounding in tort . . . ." *Id.* at 12-13.

Knieriemen indicates a reluctance on the part of New York courts to construe contractual choice-of-law clauses broadly to encompass extra-contractual causes of action. More recent decisions reflect a similar tendency. In *Twinlab Corp. v. Paulson*, 724 N.Y.S.2d 496, 496 (App. Div. 2d Dep't 2001), a suit by a company against outside consultants for breach-of-contract and tort claims based on Florida's civil RICO statute, the court considered the scope of choice-of-law and forum-selection clauses that provided as follows: "The choice of law provision stated, *inter alia*, that the 'validity, interpretation, construction and performance' of the agreement would be governed by and construed in accordance with New York law. It also designated New York as the forum for any actions 'relating directly or indirectly' to the consultant agreement." *Id.* The court held that the Florida civil RICO claim, which was based on the defendant's "alleged criminal activities, which were unrelated to his duties as a consultant," fell outside the scope of the contractual choice-of-law and forum-selection provisions. *Id.*

Under New York law, then, tort claims are outside the scope of contractual choice-of-law provisions that specify what law governs construction of the terms of the contract, even when the contract also includes a

broader forum-selection clause. *See Krock*, 97 F.3d at 645 ("Under New York law, a choice-of-law provision indicating that the *contract* will be governed by a certain body of law does not dispositively determine that law which will govern a claim of *fraud* arising incident to the contract."); *Twinlab Corp.*, 724 N.Y.S.2d at 496 (citing *Krock*). Presumably a contractual choice-of-law clause could be drafted broadly enough to reach such tort claims. *See Krock*, 97 F.3d at 645 (stating that a "sufficiently broad" choice-of-law clause would reach claims of tort arising incident to the contract). However, no reported New York cases present such a broad clause.

Case law applying New York law thus provides little guidance on the question raised in this case: whether the choice-of-law clause in the Master Agreement and Schedule, in light of the forum-selection clause, is sufficiently broad to reach a setoff claim arising from an extra-contractual source. Based on New York courts' reluctance to read choice-of-law clauses broadly, however, together with the fact that the parties could have, but did not, include within their agreement a provision creating setoff rights, we hold that as a matter of New York law, extra-contractual setoff rights fall outside the scope of the choice-of-law clause in the Master Agreement and Schedule.

The Schedule provides that: "*This Agreement* will be governed by and construed in accordance with the laws of the State of New York (without reference to choice of law doctrine)." (Emphasis added.) This language is essentially the same as the choice-of-law clause construed in *Knieriemen* which provided that " '[t]his contract shall be governed by the laws of the State of New York,' " 427 N.Y.S.2d at 12, a clause found not broad enough to reach tort claims incident to the

contractual relationship. The forum-selection clause in the Master Agreement is admittedly broader than the choice-of-law clause; it provides that: "With respect to any suit, action or proceedings *relating to* this Agreement" (emphasis added), the parties submit to the jurisdiction of the federal district courts in New York (given that the choice-of-law clause selected New York law). But no one disputes that the forum-selection clause has been given its full effect—all claims relating to the Master Agreement and Schedule, including LBSF's claim of an extra-contractual setoff right, were heard in the contractually selected forum. The forum-selection and choice-of-law clauses use different language; there is no reason to think that they have the same scope.

Most importantly, LBSF's claimed setoff right does not arise from the contract, so there is no reason that a choice-of-law clause specifying that New York law governs "[t]his Agreement" should also reach LBSF's setoff claim. Setoff claims by definition "aris[e] out of different transactions . . . they are distinguished from recoupment which involves claims arising from the same transaction." *In re Midland Ins. Co.*, 582 N.Y.S.2d 58, 61 (1992). The relationship between LBSF's setoff claim, which arises from the bills of exchange, and LBSF's obligation under the derivatives contracts governed by the Master Agreement, is purely incidental. It so happens that LBSF is asserting Finance One's debt under the bills of exchange to set off LBSF's debt under the derivatives contracts, but LBSF could just as easily have sought to recover under the bills in a completely separate proceeding. In short, LBSF's setoff claim is effectively a permissive counterclaim, and there is no reason to expect the same law to govern both a plaintiff's claim and a defendant's

permissive counterclaim. *See Cipa Mfg. Corp. v. Allied Golf Corp.*, No. 94 C 6574, 1995 WL 337022, at *2, 1995 U.S. Dist. LEXIS 7604, at *4-*5 (N.D. Ill. June 1, 1995) ("Because setoff does not destroy the plaintiff's right of action, a claim for setoff is not an affirmative defense. Instead, '[a claim for setoff] embodies a counterdemand based on some transaction entirely extrinsic to the plaintiff's cause of action; and as such it constitutes a defense only in the practical sense that it operates to reduce the remedy—rather than the debt.' As a result, a claim for setoff is properly characterized as a permissive counterclaim . . . ." (brackets in original, internal citations omitted)).

Of course, if LBSF's setoff right were created by the Master Agreement and Schedule, New York law would govern that right because the choice-of-law clause would reach it. The district court held, however, that the Master Agreement and Schedule create no setoff rights, and LBSF does not challenge this conclusion on appeal. *See Finance One*, 215 F. Supp. 2d at 399-400. Moreover, such a challenge would be unsuccessful because, as the district court explained, the reference to setoff rights in paragraph 6(e) of the Master Agreement "is simply a 'place-holder' for any setoff rights that are negotiated in separate schedules or that exist by operation of law." *Id.* at 400 (citing authoritative commentary on the ISDA Master Agreement). The parties did not negotiate any setoff rights in the Schedule that they executed. Had Finance One and LBSF wished to ensure that New York law would govern the existence and scope of any setoff rights that either party might assert, they could have easily negotiated a clause creating setoff rights in the Schedule. They did not do so. We do not believe that New York courts could stretch the Master Agreement's choice-of-law

clause, which requires the parties' "Agreement" to be "governed by and construed in accordance with" New York law, to encompass setoff rights that arise from outside the agreement, given that the parties declined to include within the agreement any provision creating such rights.

C. Application of New York Choice-of-Law Principles

New York applies separate choice-of-law approaches to contract and to tort claims. In contract cases, New York courts apply "[t]he 'center of gravity' or 'grouping of contacts' choice of law theory . . . ." *Allstate Ins. Co.*, 597 N.Y.S.2d at 907. By contrast, "the preferred analytical tool in tort cases is to apply 'interest analysis,' where the policies underlying the competing laws are considered." *Id.* at 225. LBSF's putative setoff right, however, is not clearly either a tort claim or a contract claim. Recognizing this, the district court concluded that it "sounds more in public law than in private law"—i.e., it was more like a tort claim than a contract claim—and that therefore "New York courts would resolve this choice of law issue through interest analysis." *Finance One*, 2001 WL 1543820, at *3, 2001 U.S. Dist. LEXIS 19923, at *10. We agree with this conclusion, which neither party disputes.

Interest analysis, adopted by New York in the landmark case of *Babcock v. Jackson*, 240 N.Y.S.2d 743 (1963), is the bedrock principle that underlies New York's entire choice-of-law regime: "*Babcock* remains the backdrop of New York conflicts jurisprudence . . . when specific rules fail to accommodate modern case realities." *Simon*, 124 F. Supp. 2d at 62. Thus, when no specific other approach is called for—as it is in contract cases—interest analysis is generally appropriate.

Further, disputes over rights in property are subject to interest analysis. Here, the dispute over LBSF's claimed setoff right is arguably a type of property dispute insofar as the parties disagree whether LBSF has a property right that it can assert in this lawsuit to diminish Finance One's recovery. *See In re Istim*, 575 N.Y.S.2d 796, 798-99 (1991) (applying interest analysis to determine which jurisdiction's law to apply to dispute over rights in a settlement fund). We therefore agree with the district court that under New York law, we must apply interest analysis to determine whether Thai or New York law governs LBSF's claimed setoff right.

Interest analysis is a "flexible approach intended to give controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." *Cooney v. Osgood Mach., Inc.*, 595 N.Y.S.2d 919, 922 (1993) (internal quotation marks omitted). The contacts of the parties and occurrences with each jurisdiction are thus factors to be considered in applying interest analysis, together with the policies underlying each jurisdiction's rules, the strength of the governmental interests embodied in these policies, and the extent to which these interests are implicated by the contacts.[5] *See*

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[5] Appellant's counsel appears to attempt to mislead the Court into believing that "contacts and the issue are irrelevant under the interest analysis test. . . ." Appellant's Br. at 41. To support this assertion, appellant's counsel offers the following selective quotation from a Second Circuit case: "the law of jurisdiction having the greatest interest in the litigation will be applied. . . ." *Id.* (Quoting *Wells Fargo Asia Ltd. v. Citibank, N.A.*, 936 F. 2d 723, 726 (2d Cir. 1991); internal quotation marks omitted). Appellant's counsel appears to deliberately omit the rest of this quotation, which directly contradicts counsel's assertion that

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 85, 87 (2d Cir. 2002); *Allstate Ins. Co.*, 597 N.Y.S.2d at 907.

Here the contacts between Thailand and the underlying occurrences are strong, while contacts with New York are virtually nonexistent. The derivatives transactions involved LBSF, a company organized under Delaware law that does business in New York, but virtually all of the negotiations and other activities related to the transactions took place in Thailand, Hong Kong, or Tokyo. The bills of exchange were initially negotiated between two Thai companies (Finance One and LBT), and the only apparent New York contact is that the bills were subsequently assigned to a company that does business in New York (LBSF). The only connection of the parties to New York is that LBSF has its principal place of business in New York. Finance One has no apparent contact with New York other than its relationship with LBSF.

The policies that LBSF contends provide New York with a strong interest in the issues presented by this litigation are:

"contacts . . . are irrelevant" under the interest analysis test. The original language reads in full: "The rule in New York is that the greatest interest in the litigation will be applied and that the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict." *Wells Fargo*, 936 F. 2d at 726 (quoting *Intercontinental Planning, Ltd., v. Daystrom, Inc.*, 300 N.Y.S. 2d 817, 825 (1969)) (emphasis added). Far from being irrelevant, contacts that "relate to the purpose of the particular law in conflict" are essential to interest analysis. Zealous advocacy does not call for this kind of misleading briefing, which, even if not intentionally misleading, disserves the client and tarnishes counsel's credibility.

> New York's strong public policy interest in protecting the justified expectations of its citizens by applying New York law to disputes arising out of international finance transactions they enter into with foreign countries, in insuring the stability and predictability of international financial markets, and in maintaining New York's role as the world's leading financial center.

Appellant's Br. at 41 (internal quotation marks omitted). LBSF also points to "New York's deep-rooted public policy in favor of set-off rights and in protecting New York creditors." *Id.* at 44.

The first of these purported interests—protecting justified expectations—simply begs the question. We have already decided that the parties did not agree in the Master Agreement to have New York law govern the existence of a setoff right, and so we must turn somewhere else to determine what the parties were justified in expecting at the inception of their relationship. New York courts have inferred the parties' "justified expectations" from the contacts of the parties and their dispute with New York. *See, e.g., J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 371 N.Y.S.2d 892, 897-99 (1975) (holding that New York law governed where payment was to be rendered in New York and New York was locus of repudiation). LBSF's argument seems to suggest that New York citizens involved in international finance may always justifiably expect New York courts to apply New York law to their disputes with foreign citizens, regardless of the lack of any specific government interest in, or significant New York contact with, the dispute. New York courts have not gone this far.

The next two New York interests relied on by LBSF are entirely generic, and seem to suggest that New York has a strong governmental interest in having its law apply to any legal dispute that affects the global economy. The cases relied on by LBSF, *J. Zeevi* and *Wells Fargo*, while containing sweeping language referring to New York as the "financial capital of the world," *Wells Fargo*, 936 F.2d at 726; *J. Zeevi*, 371 N.Y.S.2d at 898, concerned breach-of-contract claims where the contracts had significant connections to New York, and relied on the need to respect the parties' "justified expectations" that New York law would apply based on those contacts. Here there are no such significant contacts of the underlying transactions with New York that would lead us to conclude that the parties "justifiably expected" that New York law would apply.

LBSF does articulate one governmental interest of New York that is particularized to the instant dispute—New York's policy of protecting its creditors by assuring them setoff rights. While the strength of this interest is perhaps diminished, as argued by Finance One, by the fact that LBSF only became a creditor by having the rights of Finance One's original creditor, LBT, assigned to it, this remains an interest of New York that we must consider.

Finance One articulates two strong governmental interests of Thailand in its Finance One's dispute with LBSF: (1) Thailand's interest in enforcing the orders of its Ministry of Finance and thereby ensuring the stability and well-being of its economy; and (2) its interest in ensuring "equitable treatment and adequate protection for *all* creditors" of Finance One. Appellee's Br. at 34. LBSF is incorrect in arguing that these interests are illegitimate. First, even if, as LBSF

contends, the Ministry's orders do not bar LBSF's setoff rights, Thailand has a strong interest in having the effect of its government's orders determined in accordance with Thai law. Second, LBSF contends that Thailand's interest in ensuring equal treatment of Finance One's creditors is not implicated because Finance One's bankruptcy proceedings did not commence until six months after LBSF claimed its setoff. However, the Ministry of Finance orders suspending and then terminating Finance One's business operations in June and July of 1997 were clearly aimed at protecting Finance One's creditors, among other things, and therefore this interest, which the Special Master identified as springing not from the bankruptcy proceeding but from "the notion of public order or good morals of the Thai people," is implicated to the extent that LBSF's setoff sought an advantage not held by other creditors who were not also debtors to Finance One.

Unlike most of the interests articulated by LBSF, the interests articulated by Finance One are particularized to, and appear to be actually implicated by, the dispute at hand. The Special Master identified them as strong policies of Thailand. Given the minimal contacts of the parties or transactions to New York and the limited identified interests of New York in application of its law, these interests are sufficient to tip the balance of interests in favor of applying Thai law.

II. Finance One's Reliance on the Master Agreement

Finance One contends that the Master Agreement expressly prohibits LBSF's setoff because LBSF set its obligation under the Agreement off against the face value of Thai baht instruments that were in fact value-

less, with the result that Finance One did not receive the amount due in U.S. dollars as required by the Agreement. We disagree.

We review contract interpretation *de novo*. *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 74 (2d Cir. 2004). Finance One relies on the following language in the Master Agreement:

> 8. Contractual Currency
>
> (a) *Payment in the Contractual Currency.* Each payment under this Agreement will be made in the relevant currency specified in this Agreement for that payment (the "Contractual Currency"). To the extent permitted by applicable law, any obligation to make payments under this Agreement in the Contractual Currency will not be discharged or satisfied by any tender in any currency other than the Contractual Currency, except to the extent such tender results in the actual receipt by the party to which payment is owed, acting in a reasonable manner and in good faith in converting the currency so tendered into the Contractual Currency, of the full amount in the Contractual Currency of all amounts payable in respect of this Agreement.

In the Schedule the parties adopted U.S. dollars as the generally applicable Contractual Currency in the event of termination payments. Since the language of paragraph 8(a) of the Master Agreement clearly allows LBSF to pay Finance One in the Thai baht equivalent of the U.S. dollar amount owing, Finance One argues that LBSF's payment in the form of discharging Finance One's obligation to pay it under the bills was prohibited because the bills were valueless and it

therefore did not "actually receive" payment in the full amount of U.S. currency owing. This is a creative argument, but this contractual provision appears concerned only with ensuring that currency amounts are converted to their equivalent and does not speak to the form of payment. LBSF paid in the form of discharging a legal obligation of Finance One to pay a debt in Thai baht equivalent to the U.S. dollar amount owed, and the contractual language does not prohibit this. Finance One argues, somewhat disingenuously, that because the bills were valueless in the secondary market it received nothing from LBSF. Finance One received the discharge of its obligation to pay and, despite the fact that the Ministry of Finance orders would have otherwise prevented it from paying the full face value for the time being, absent the discharge LBSF would be entitled to claim in the bankruptcy proceedings and receive, apparently, exactly what the Special Master recommended and the district court awarded—44.4% of the bills' face value.

LBSF argues, and the district court correctly held, *see Finance One*, 215 F. Supp. 2d at 400-01, that language in the Schedule even more clearly authorizes LBSF to render its payment in the Thai baht equivalent of the U.S. dollar amount owing, notwithstanding that Finance One did not actually "receive" the correct dollar amount after good faith conversion. Paragraph 1(g) of the Schedule states that:

> "Termination Currency" means USD, except that upon the occurrence of an Event of Default, it means the currency which is a freely available contract currency in respect of at least one current Transaction and selected by the Non-defaulting or the non-Affected party
>
> . . . .

Thai baht was a contract currency of a number of the derivatives transactions. Events of Default are defined in paragraph 5(a) of the Master Agreement, and include "bankruptcy," which is defined to include the situation where "[t]he party . . . becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due . . . ." While the relevant language requires as a prerequisite to the Non-defaulting Party's right to select an alternate contract currency only that an Event of Default have "occurred," Finance One argues that because LBSF chose to announce its termination of the derivatives transactions on the ground of "material adverse change," which is defined as a "Termination Event" and not an Event of Default under the Agreement, it may not take advantage of this provision. LBSF's announcement is irrelevant, however, because the Agreement requires only that the Event of Default have "occurred." Therefore, an exception to the general provision specifying U.S. dollars as the Contractual Currency applies, and LBSF was expressly authorized to pay in Thai baht.

III. Application of Thai Law

We review the district court's interpretation and application of foreign law *de novo*. *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79, 81 (2d Cir. 1994). The principal relevant Thai statute is Section 341 of the Thai Civil and Commercial Code, which states in relevant part:

> If two persons are bound to each other by obligations whose subject is of the same kind and both of which are due, either debtor may be discharged from his obligation by setoff to

> the extent to which the amounts of the obligations correspond, unless the nature of one of the obligations does not admit of it.

Section 342 of the Code provides that "[s]et-off is made by a declaration of intention by one party to the other," which may not be subject to any "condition or time of commencement or ending" and which "relates back in its effect to the time when both obligations could first have been set off." The setoff right is limited by Section 344 of the Code which states that: "A claim against which there is a defence may not be set off." Both parties agree that Section 5 of the Code imposes a requirement that the party claiming setoff, "in the exercise of his rights and in the performance of his obligations, act in good faith." Under Section 6 of the Code there is a rebuttable presumption of good faith.

Finance One challenges the validity of the setoff on five grounds. First, Finance One argues that the Ministry of Finance orders suspending its business created a defense to its payment obligation under the bills of exchange, so that setoff was prohibited under Section 344. Second, Finance One asserts that LBSF acquired the bills from LBT in a sham sale exclusively for the purpose of setting them off against its derivatives obligations, and argues that such conduct constitutes bad faith as a matter of law under Thai law, so that setoff was prohibited under Section 5. Third, Finance One asserts that the transfer of the bills from LBT to LBSF was ineffective due to the fact that the bills were endorsed by the Bangkok Bank at the direction of LBT but in the absence of a written power of attorney, which Finance One claims was a requirement for effective transfer. Finance One asserts that the mutuality required by Section 341 was therefore lacking.

Fourth, Finance One argues that LBSF provided legally inadequate notice of its exercise of its setoff right. Fifth, Finance One argues that LBSF's attempt to exercise its setoff right was ineffective due to LBSF's failure to surrender the bills. Finally, Finance One argues in the alternative that even if the setoff was valid, the value LBSF was entitled to set off could in no event be greater than what the district court allowed, because Thai law would not allow a setoff that would prejudice the rights of Finance One's other similarly situated creditors.

A. The Right to Setoff

While the Special Master's reports are perhaps not models of clarity, the Master did clearly find that LBSF had a right to set off the value of the bills against its derivatives obligations. Thus, the Master stated that "[t]he Special Master reads [Section 341 of the Thai Civil and Commercial Code] as permission of set-off rights of LBSF in the absence of any declared intention of the parties, disallowing set-off." The Master also clearly rejected Finance One's argument that LBSF exercised its setoff right in bad faith, and implicitly rejected Finance One's various other arguments against the setoff. Because our review is *de novo*, we are not limited to the Master's findings, nor need we show them any particular deference.

We agree with the Special Master that Section 341 of the Thai Civil and Commercial Code establishes an unambiguous right to set off mutual obligations against one another. We find unconvincing Finance One's argument that the mutuality required by Section 341 was lacking because the bills had not been properly transferred. Finance One relies on Section 798 of the Code as requiring a written power of attorney to

make transfer by an agent effective. However, Section 798 requires only that the agent's authority to transfer be evidenced by a writing. Here such evidence exists in the form of a fax from LBT to Bangkok Bank dated June 27, 1997. We also find unconvincing Finance One's argument that LBSF was required to surrender the bills to complete the setoff. We read Section 342 of the Code as rendering setoff effective when declared, with no precondition of surrender. Finance One relies on Section 930 of the Code, but this section requires surrender only when a bill of exchange is presented for payment, not when its payment obligation is set off against another obligation. We also find unavailing Finance One's argument that LBSF's notice of setoff was inadequate. LBSF notified Finance One of its election to exercise its setoff right by letter dated July 29, 1997, which identified all of the relevant bills and derivatives transactions. In the absence of any formal requirements for notice of setoff under the Thai Civil and Commercial Code, we believe that this was sufficient to identify the obligations being set off and thus to satisfy Section 342's requirement of a "declaration of intention by one party to the other."

Finance One's most substantial arguments against the setoff are those based on bad faith and the Ministry of Finance orders. The July 25, 1997, order of the Ministry of Finance provides that Finance One shall "not make any repayment under the . . . bills of exchange . . . ." Finance One argues that this language would constitute a defense to enforcement of the bills and therefore renders the setoff invalid under Section 344 of the Thai Civil and Commercial Code. While this language clearly forbade Finance One from voluntarily making payment on any of its outstanding bills of exchange, this preclusion does not necessarily imply

that the order would constitute a defense in a civil action seeking payment in a Thai court. None of the Thai legal materials in the record definitively resolves this quandary. Because Finance One bears the burden of establishing its defense to enforcement of the bills, we conclude that the Ministry order does not negate LBSF's right to setoff. We note that this result appears sensible in light of Section 342, which renders setoff a right exercisable unilaterally, with no requirement that the other party consent.

In arguing that LBSF's exercise of its setoff right manifested bad faith as a matter of law, Finance One relies on *Huaykaew Real Estate Co. v. CMIC Finance & Securities Public Ltd.*, Book No. 7085/2542 No. 78 (S. Bangkok Civ. Ct. June 14, 1999), the only Thai case cited by either party in its briefs before this Court. In *Huaykaew* defendant financial company had been suspended from operations by orders issued by the Ministry of Finance on the same dates as the June and July orders suspending Finance One, but had also been placed into liquidation by an order in December 1997. Plaintiff, already in debt to the defendant, became a creditor by acquiring the defendant's debentures subsequent to the liquidation order. Plaintiff claimed that the entirety of its obligation to defendant was extinguished by setting off the debentures against that obligation, and sued to recover the balance due on the debentures. The court held that the setoff was invalid because defendant had a bad faith defense to enforcement of the debentures. The court relied on its

> opinion that the plaintiff has been well aware that the defendant's business operation was suspended temporarily by the [June] order . . . and up to the date [of the December order] . . . . In this regard, the plaintiff should be

> well aware that the defendant would be no longer to assume its normal business operation and was unable to make profits or repay the payment under the debentures as usual.

From the timing the court inferred that "the plaintiff bought the defendant's debentures with an intention for a setoff . . . and . . . placing the plaintiff to have an advantage over the defendant's other bona fide creditors and debtors."

LBSF admits that the transfer of the bills from LBT to LBSF was motivated, at least in part, by the desire to create setoff rights against its derivative obligations to Finance One, and that at the time of transfer it was aware that Finance One had begun defaulting on its debts. This case is, therefore, for the most part, indistinguishable from *Huaykaew*. LBSF attempts to distinguish the cases on the ground that, in *Huaykaew*, liquidation proceedings had begun before the debentures were transferred, but the court in *Huaykaew* relied not on the timing of the liquidation but on the fact that plaintiff was aware that defendant's business had been suspended and that defendant was therefore forbidden to make payment on its debentures. Plaintiff's acquisition of the debentures was therefore taken to be aimed at obtaining unfair advantages over those creditors of the defendant who did not owe it debts against which they could exercise the right of setoff.

The sole significant distinction between the instant case and *Huaykaew* is, rather, that LBSF acquired the bills, at the latest, the day before the suspension of Finance One's business became public knowledge, whereas the bills in *Huaykaew* were acquired with knowledge that a suspension had already occurred. The allegation here is that LBSF should have inferred from the conspicuous financial deterioration of Finance One

that its suspension from business was imminent. Were we to follow *Huaykaew* this dispute over LBSF's knowledge of Finance One's condition would merely raise a factual issue for resolution at trial. However, there are factors that render *Huaykaew* of limited persuasive force. First, *Huakyaew* is a trial-court case that we would in no event treat as binding precedent. Furthermore, Thailand is a civil-law jurisdiction where judicial decisions in general are of only persuasive and not binding authority. As noted by the Special Master, even decisions of the Thai Supreme Court are only "highly persuasive," and not "absolutely binding," on lower Thai courts. A trial-court case from a jurisdiction that does not recognize the doctrine of precedent is of especially limited persuasive authority. *See American Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260-61 (5th Cir. 2003) (noting that when construing law of civil law jurisdiction, even consistent body of intermediate appellate-court decisions may be disregarded in light of persuasive evidence from primary sources of law, including constitution, civil code, and statutes); *Curley*, 153 F.3d at 14 (noting that primary sources of law in civil law jurisdiction are constitution, civil code, and statutes).

In light of the statutory presumption of good faith in Section 6 of the Thai Civil and Commercial Code, we find the Special Master's finding of good faith more persuasive than the reasoning in *Huaykaew*. As noted by the Master, "[t]here was no evidence to show that the purpose of the exercise was to take undue advantage, less to defraud other possible creditors." Finance One failed to meet its burden to present evidence sufficient to rebut the presumption of good faith.

B. Valuation of the Bills for Purposes of Setoff

Having determined that LBSF was entitled to, and did effectively, exercise its statutory setoff right, the Special Master informed the district court that under Thai law a court would have equitable discretion to value the bills for setoff purposes so as to discount them to the proportion that would have been available in a claim in bankruptcy proceedings, thus preventing inequity among creditors. The Master proposed several methods of valuation aimed at this result, one of which the district court adopted. We review for abuse of discretion a district court's decision to exercise equitable discretion. *See Felton v. Secretary, U.S. Dep't of Educ.*, 787 F.2d 35, 37 (2d Cir. 1986). We hold that the district court abused its discretion when it deferred entirely to the Master's recommendation and failed to conduct an independent analysis of the appropriateness of equitable relief.

Under common law principles it is well established that equitable discretion may sometimes be exercised to avoid harm to the public interest or unconscionability to a party that would be the consequence of the unflinching application of legal principles.[6] *See, e.g., Grand Union Co. v. Cord Meyer Dev. Co.*, 761 F.2d 141, 147 (2d Cir. 1985) (applying New York law, noting that court has equitable power "to devise whatever remedy it believes in its discretion is necessary to make injured parties whole." (internal quotations marks and ellipsis omitted)); *423 S. Salina St.*,

[6] Because no evidence has been presented by either party bearing on the standards a Thai court should apply in determining whether to exercise equitable discretion, we apply New York law to this question. *See Curley*, 153 F.3d at 14 ("It is only when no evidence of foreign law has been presented that the courts will decide cases in accordance with New York law.").

Inc. v. City of Syracuse, 510 N.Y.S.2d 507, 511 (1986) (noting that court has equitable power to grant monetary relief when required "in order to prevent a failure of justice"); *Kaminsky v. Kahn*, 259 N.Y.S.2d 716, 723 (App. Div. 1st Dep't 1965) (noting that court has equitable power to adapt relief to "exigencies of the case"); *London v. Joslovitz*, 110 N.Y.S.2d 58, 59-60 (App. Div. 3d Dep't 1952) (per curiam) ("The power of equity is as broad as equity and justice require . . . ."); *see also SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 456 (1940) (stating that a court of equity may deny or impose conditions on relief otherwise available when required by the public interest).

Here Finance One contends that allowing LBSF to set off the full face value of the bills undermines the strong Thai public policy of ensuring equity among similarly situated creditors and grants LBSF a windfall at the expense of those creditors of Finance One not lucky enough to owe it outstanding debts. This strikes us as a weak showing of entitlement to equitable relief. It must be borne in mind that we have recognized LBSF's right to set the bills off against its derivative obligations, and have rejected any assertion that it exercised this right in bad faith. Furthermore, we have noted instances in which Thai law appears to treat the right to setoff differently from the right to receive actual payment of an obligation, including the immediate effectiveness of setoff on unilateral declaration and the lack of a surrender precondition. Given our findings and our reading of Thai law, Finance One has not demonstrated that any Thai public policy is actually implicated by LBSF's exercise of its setoff right. LBSF is not similarly situated to creditors who are seeking payment as opposed to setoff. There is thus no obvious reason why Thai public policy, as it has been portrayed

by the Special Master and the parties, should be offended that LBSF is not treated similarly to such creditors. For the same reason we are not concerned that LBSF is receiving an unconscionable windfall. LBSF is receiving merely what it is entitled to under the bills, and if other creditors do not receive the same thing that is because LBSF is differently situated from other creditors.

We therefore hold, in light of the record, that Finance One has not demonstrated entitlement to an equitable reduction in LBSF's setoff amount.

CONCLUSION

For the foregoing reasons, we reverse the judgment entered for plaintiff and remand for entry of judgment for defendant. In light of this disposition, we need not decide whether the district court erred in its calculation of pre- and post-judgment interest.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 00 Civ. 6739 (CBM)
Filed September 4, 2003

FINANCE ONE PUBLIC COMPANY LIMITED,

Plaintiff,

—against—

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

Motley, J.

In *Finance One Public Co. Ltd. v. Lehman Bros. Special Financing, Inc.*, 2003 WL 21638214 (S.D.N.Y. July 11, 2003) (hereinafter "*Fin One Interest*", this court ruled that plaintiff Finance One Public Company Limited ("Fin One") was entitled to pre-judgment interest at a rate of 17.04% and post-judgment interest at a rate of 18.04% from defendant Lehman Brothers Special Financing, Inc. ("LBSF"). LBSF has filed a Motion to Reconsider, Alter or Amend Judgment, and Fin One has filed a Motion for Clarification and/or Correction of Judgment. Having reviewed the parties' submissions, the court now briefly

addresses these Motions, denying the former and granting the latter.

LBSF's Motion is denied for two reasons. First, it was untimely filed. Local Civil Rule 6.3 states that "a notice of motion for reconsideration shall be served within ten (10) days after the docketing of the court's determination of the original motion." Defendant's instant motion was filed on July 31, 2003, more than ten days after the Judgment in this case was entered into the docket. Second, and more important, defendant's arguments were either considered and rejected by this court in *Fin One Interest* or not raised at all in the multiple sets of briefing papers this court allowed the parties to submit. It is well-settled that a motion for reconsideration is "not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple." *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998) (citation and internal quotation marks omitted).

With respect to Fin One's Motion and the Judgment previously entered in this case, the court has concluded that it merits refinement with respect to the specific rates of interest to be applied to specific dates as well as to the question of whether the interest is to be compounded daily for both pre- and post judgment interest (it is). Accordingly, pursuant to Fed. R. Civ. P. 60(a), the Judgment in this case is modified as reflected by the Judgment dated this same day.

SO ORDERED.

CONSTANCE BAKER MOTLEY

CONSTANCE BAKER MOTLEY
United States District Judge

Dated: September 3, 2003
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 00 Civ. 6739 (CBM)

FINANCE ONE PUBLIC COMPANY LIMITED,

Plaintiff,

—against—

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Defendant.

JUDGMENT

In light of this court's Memorandum Opinion and Order dated this same day as well as its decisions in *Finance One Public Co. Ltd. v. Lehman Bros. Special Financing, Inc.*, 2003 WL 21638214 (S.D.N.Y. July 11, 2003) and *Finance One Public Co. Ltd. v. Lehman Bros. Special Financing, Inc.*, 2003 WL 2006598 (S.D.N.Y. May 1, 2003) (hereinafter "*Fin One Set-Off*"), it is ordered and adjudged that plaintiff Finance One Public Company Limited ("Fin One") recover from defendant Lehman Brothers Special Financing, Inc. ("LBSF") the sum of $5,351,032.66,[1] with interest thereon as calculated from

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[1] This amount is calculated by taking the $9,664,204.00 originally owed by LBSF to Fin One, Fin One Counterstatement of Undisputed Material Facts, ¶ 60, subtracting the $12,305.27 paid by

July 25, 1997 (the date of defendant's early termination of the derivatives transaction, *see* LBSF Rule 56.1 Statement of Undisputed Material Facts, ¶ 55) through today's date at a rate of 16.42% per annum for the period July 25-31, 1997; 18.73% per annum for the period August 1997; 17.25% per annum for the period September 1997; 17.45% per annum for the period October 1997; and 18.04% per annum thereafter, each compounded daily. It is further ordered and adjudged that additional interest shall be accrued and paid at a rate of 18.04% per annum, compounded daily from and after today's date until the total amount of this Judgment, including the additional interest due, has been paid.

SO ORDERED.

CONSTANCE BAKER MOTLEY

CONSTANCE BAKER MOTLEY
United States District Judge

Dated: September 3, 2003
New York, New York

LBSF, *id.*, and further subtracting the $4,300,866.07 LBSF was entitled to set-off pursuant to this court's decision in *Fin One Set-Off*. *See Fin One Set-Off*, 2003 WL 2006598, at *2.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 00 Civ. 6739 (CBM)

FINANCE ONE PUBLIC COMPANY LIMITED,

Plaintiff,

—against—

LEHMAN BROTHERS SPECIAL FINANCING INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

Motley, J.

By Memorandum Opinion and Order, this court ruled that defendant Lehman Brother Special Financing, Inc. ("LBSF") was entitled to claim a set-off of $4,300,866.07 towards the debt of approximately 59.7 million it owed to plaintiff Finance One Public Company Limited ("Fin One"). *Finance One Public Co. Ltd. v. Lehman Bros. Special Financing, Inc.*, 2003 WL 2006598. at *1 (S.D.N.Y. May 1, 2003) (hereinafter "*Fin One Set-Off*"). The court did not set rates of pre- and post-judgment interest and called for briefing on that issue by Order dated May 12, 2003. In its papers, Fin One asserts that the rates of interest are governed by the International Swap &

Derivatives Assocation, Inc. ("ISDA") Master Agreement dated lune 30, 1995 and agreed to by the parties. *See* Complaint, Ex. 1 ("the ISDA" or "the Master Agreement"). Defendant LBSF contends that the rates of interest are governed by Thai law and should be decided according to Thai law's equitable principles, just like the court's last decision applying Thai law with respect to the question of whether LBSF was entitled to an extra-contractual set-off. In the alternative, LBSF argues that if New York law governs, Fin One's proposed rate is too high and the actual rate remains an issue of fact whose resolution requires a hearing.

For the reasons that follow, the court finds for plaintiff and awards pre-judgment interest at a rate of 17.04% and post-judgment interest at a rate of 18.04%.

New York Law Governs the ISDA Master Agreement

In resolving the choice of law issues in this case, this court ruled that "New York law controls whether defendant is liable to plaintiff under the ISDA Master Agreement. . . ." *Finance One Public Co. Ltd. v. Lehman Bros. Special Financing, Inc.*, 2001 WL 1543820, at *3 n.4 (S.D.N.Y. Dec. 4, 2001) (hereinafter "*Fin One CoL I*"). Contrary to defendant's assertion, this court's *Fin One Set-Off* ruling that LBSF was entitled to an extra-contractual right to set-off under the equitable principles of Thai law did not reopen the question of whether New York law governed the question of defendant's liability under the ISDA. *See* LBSF Mem. of Law Regarding Interest at 1. That decision addressed only the narrow question of extra-contractual set-off rights, and it did so only because the court had previously ruled that the ISDA neither guaranteed nor precluded LBSF's right to assert a set-off. *See Finance One Public Co. Lid. v. Lehman Bros. Special Financing, Inc.*, 215 F.Supp.2d

395, 399-401 (S.D.N.Y. 2002) ("hereinafter *Fin One CoL II*"). Most important for the instant matter, *the court arrived at its conclusion in Fin One CoL II by applying New York Law. See id.* at 399 (noting that New York law governs the ISDA pursuant to its choice of law clause and citing *New York v. Oneida Indian Nation of New York*, 90 F.3d 58 (2d Cir. 1996), which applied New York law).

It is well-settled under Second Circuit law that the "entitlement to and amount of interest in a breach of contract action is governed by the state law under which the contract is interpreted." *Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 875 F.Supp. 165, 174 n.10 (S.D.N.Y. 1994)(citing *Lee v. Joseph E. Seagram & Sons, Inc.*, 592 F.2d 39, 41 n.2 (2d Cir. 1979)); *see also Spector v. Mermelstein*, 485 F.2d 474 (2d Cir. 1973) (same and collecting cases). It is similarly well-settled under New York law that "if the contract between the parties provides for a different rate (than the statutory rate), that rate shall control." *Morse/Diesel, Inc.*, 675 F.Supp. at 174 (citing *Marine Mgmt., Inc. v. Seco Mgmt., Inc.*, 574 N.Y.S.2d 207, 208 (2d Dep't 1991)); *see also Stull v. Joseph Feld, Inc.*, 309 N.Y.S.2d 985, 987 (1st Dept 1970) (holding that "when the contract provides that interest shall be paid at a special rate until the principal shall be paid, the contract rate governs. . ." and collecting cases).

The Terms of the ISDA Master Agreement

Under the Master Agreement, in the event of an early termination of the derivative transactions, the terminating parry is required to pay the amount due "together with (to the extent permitted under applicable law) interest thereon (before as well as after judgment) in the Termination Currency . . . at the Applicable Rate. Such

interest will be calculated on the basis of daily compounding and the actual number of days elapsed." ISDA, § 6(d)(ii), at 9. The "Applicable Rate" is defined as the "Default Rate," ISDA, § 14(b), at 14, which in turn is defined as "a rate per annum equal to the cost *(without proof or evidence of any actual cost)* to the relevant payee *(as certified by it)* if it were to fund or of funding the relevant amount plus 1% per annum. § 14(d), at 14 (emphasis added). There is no escape clause from these provisions contained in the ISDA.

Plaintiff has complied with section 14(d) by certifying the cost of funds through the Special Manager of Fin One, Mongkhon Maksacreekun. *See* Mongkhon Aff. dated March 8, 2002, ¶ 20 & Ex. 7; Mongkhon Reply Aff. dated April 23, 2002, ¶ 4; Mongkhon Proper Interest Rate Aff. dated May 16, 2003, ¶ 2 & Ex. 2. Moreover, even though it was not required to do so by the ISDA, *see* ISDA, § 14(d), at 14, plaintiff has provided ten promissory notes demonstrating the interest rates at which it was forced to borrow funds. Mongkhon Proper Interest Rate Aff. dated May 16, 2003, Ex. 2. The proper interest rate for pre-judgment interest is 17.04%; for post judgment interest, the proper rate is 18.04%. *Id.*

Defendant LBSF attempts to create an issue of fact by arguing that the rates certified by Mr. Mongkhon are exaggerated. *See* LBSF Mem. of Law Regarding Interest at 2; *see generally* Kittivalai Reply Aff dated May 23, 2002. This argument, however, ignores the fact that the ISDA explicitly precludes an issue of fact contest with regard to the proper default rate with the phrases "without proof or evidence of any actual cost" and "as certified by it." ISDA, § 14(d), at 14. Under New York law, the only possible route to avoid enforcement of this clause in the contract would be to suggest bad faith, fraud, gross negligence or contravention of public pol-

icy, which LBSF does not do. *Cf. Kalisch-Jarcho, Inc. v. City of New York*, 448 N.E.2d 413, 416-17 (1983) (holding that as a general contract principle contract provisions will be enforced when "entered into at arms length by sophisticated contracting parties," absent a showing of "intentional wrongdoing," either "fraudulent" or "malicious, prompted by the sinister intention of one acting in bad faith," "gross negligence" or contravention of public policy). There can be no question that the parties to this case are sophisticated and that they agreed to the terms of the LDA at arms length. Plaintiff demonstrates that the interest rates it certified are neither contrary to public policy nor unconscionable. *See* Fin One Mem. of Law in Supp. of Proper Interest Rate at 4 n.3 (citing *Marine Mgmt., Inc.*, 574 N.Y.S.2d at 208 (awarding pre-judgment interest at 25% per annum) and *In re Best Payphones, Inc.*, 2003 WL 1089525, at *5-6 (Bankr. S.D.N.Y. 2003) (awarding pre-judgment interest at rate of 18% per annum)).

Conclusion

In light of the foregoing, the court finds for plaintiff and awards pre-judgment interest at a rate of 17.04% and post judgment interest at a rate of 18.04%.

SO ORDERED.

CONSTANCE BAKER MOTLEY

CONSTANCE BAKER MOTLEY
United States District Judge

Dated: June 30, 2003
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 00 Civ. 6739 (CBM)

FINANCE ONE PUBLIC COMPANY LIMITED,

Plaintiff,

—against—

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Defendant.

JUDGMENT

In light of this court's Memorandum Opinion dated this same day as well as its decision in *Finance One Public. Co. Ltd. v. Lehman Bros. Special Financing, Inc.*, 2003 WL. 2006598 (S.D.N.Y. May 1, 2003) (hereinafter "*Fin One Set-Off*"), it is ordered and adjudged that plaintiff Finance One Public Company Limited ("Fin One") recover from defendant Lehman Brothers Special Financing, Inc. ("LBSF") the sum of $5,351,032.66,[1]

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[1] This amount is calculated by taking the $9,664,204.00 originally owed by LBSF to Fin One, Fin One Counterstatement of Undisputed Material Facts, ¶60, subtracting the $12,305.27 paid by LBSF, *id.*, and further subtracting the $4,300,866.07 LBSF was entitled to set-off pursuant to this court's decision in *Fin One Set-Off*. *See Fin One Set-Off*, 2003 WL 2006598, at *2.

with interest thereon as calculated from July 25, 1997 (the date of defendant's early termination of the derivatives transaction, *see* LBSF Rule 56.1 Statement of Undisputed Material Facts, ¶ 55) through today's date as a rate of 17.04% per annum. It is further ordered and adjudged that additional interest shall be accrued and paid at a rate of 18.04% per annum, compounded daily from and after today's date until the total amount of this Judgment, including the additional interest due, has been paid.

SO ORDERED.

CONSTANCE BAKER MOTLEY

CONSTANCE BAKER MOTLEY
United States District Judge

Dated: June 30, 2003
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 00 Civ. 6739 (CBM)
Filed May 1, 2003

FINANCE ONE PUBLIC COMPANY LIMITED,

Plaintiff,

—against—

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

Motley, J.

In an Opinion and Order issued August 2, 2002, this court ruled on the several motions for summary judgment filed in this case, except one—whether under Thai Law defendant Lehman Brothers Special Financing ("LBSF") possessed an extra-contractual set-off right. *Finance One Public Co. Ltd. v. Lehman Bros. Special Financing Inc.*, 215 F.Supp.2d 395 (S.D.N.Y. 2002) (hereinafter "*Fin One I*").[1] The court was unable to resolve that question because the experts on Thai law each party

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[1] In that decision, the court laid out in detail the factual background to this matter; familiarity with those facts is presumed.

offered seemed equally distinguished and credible and yet came to opposite conclusions. *Id.* at 402. Further, although the court was aware that it was empowered by the Federal Rules to resolve the question through its own inquiry, Fed. R. Civ. P. 41.1, the court explained, "[i]n the instant case this is easier said than done, however, because the court's library does not carry Thai reporters, nor are they available on Westlaw or Lexis-Nexis." *Id.* at 403. Accordingly, the court determined that it would require the assistance of a Special Master in Thai law to resolve the single outstanding issue. *Id.*

Parties were unable to agree on a prospective Special Master, however, and so, after reviewing the parties' briefings on the several candidates whose names had been offered by the parties, the court wrote to Dr. Sompong Sucharitkul, D.C.L, Associate Dean and Professor of International and Comparative Law at Golden Gate University in San Francisco, to inquire whether he was in fact an expert on Thai law and whether he had any affiliations which would compromise his ability to serve without bias. Upon being assured that he was qualified and impartial, the court, by Order dated October 30, 2002, chose Dr. Sompong as Special Master and charged him with "assist[ing] the court in determining whether defendant [LBSF] possessed an extra-contractual set-off right under Thai statutory, constitutional and/or administrative law. . . ." *Id.*

The Report submitted by the Special Master ("Report") undertakes a lengthy discussion of the facts (contested and uncontested) of the case, the constitutionality of the Thai government's actions with respect to plaintiff Finance One Public Company Limited ("Fin One") and their effect on LBSF, and concludes that "LBSF could be deemed to have a right to set-off which is not unqualified. Assuming its debts to Fin One to be

in the approximate amount of US $9.7 million, a Thai court could exercise its judicial discretion in an equitable manner."[2] Report, ¶ 26. Further, the Special Master suggested two possible outcomes of the exercise of this discretion:

1. Grant LBSF a set-off of roughly $4.3 million, based on a calculation of Fin One's assets and liabilities. Report, ¶ 28. That calculation yields a ratio of 4/9, which, multiplied by $9.7 million, comes to roughly $4.3 million. *Id.*, or

2. Grant LBSF a set-off of $5.38 million, based on a calculation of the "average exchange rates ,taking into account the relevant date, i.e. July 27, 1997 and the prevailing Baht-US$ market rate as recorded by the International Monetary Fund." Report, ¶ 29. That calculation yields a ratio of 25/45, which, multiplied by $9.7 million comes to roughly $5.38 million. *Id.*

In a letter dated March 31, the court requested that Dr. Sompong clarify his Report, which he did in a Supplemental Report dated April 4, 2003 ("Supplemental Report"). Dr. Sompong explained that owing to the tension between Thai law and International law, to the extent that certain international agreements are enforceable in Thailand, LBSF should neither be allowed the full amount of the set-off it claimed nor denied any set-off whatsoever. Supplemental Report, ¶¶ 10-26. "The

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[2] This court, according to the Special Master, "would be able to apply applicable Thai law *qua* law with all the judicial discretion pertaining to Thai Justices in *simile casu*." Report ¶ 26. Unquestionably, the determination and application of foreign law is a question for the court. *See, e.g., Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 604 (2d. Cir; 1999) (citing *Curley v. AMR Corp.*, 153 F.3d 5, 11 (2d Cir. 1998).

two extremes are not recommended," he wrote. *Id.*, ¶ 26. Dr. Sompong again defended the two solutions suggested in the Report (and enumerated, *supra*), but implied a preference for the first: "The first solution is authorized by Thai law and could be adopted by the US Court applying Thai law. The second solution is indeterminate." *Id.*[3]

The court agrees that the first solution is preferable. The Special Master's calculations of a 419 ratio were an approximation, however, and given the size of the numbers involved there is no reason to forgo a more precise calculation. According to the Liquidator/Petitioner who appeared before Thailand's Central Bankruptcy Court, the bankrupt Fin One's assets amounted to Baht 40,282,637,000, whereas its liabilities amounted to Baht 90,401,302,000. *See* Reply Aff. of Prof. Sahaton Rattanapijit and Kittivalia Charoensombut-Amorn in Supp. of LBSF's Cross Motion for Sum. J., Ex. 3, Clauses 6(1), 6(2). Using those two numbers yields a slightly different ratio, the decimal value of which is .4456 (rounded to the nearest ten-thousandth), or 44.56 percent: Multiplying that percentage by the amount of set-off claimed by LBSF, 59,651,898.73, LBSF Counterstatement of Undisputed Material Facts, 15.9, the court calculates that the set-off allowable for LBSF under Thai Law is $4,300,866.07.

Accordingly, the court rules that LBSF is entitled to claim a set off of $4,300,866.07. The court thanks Dr. Sompong for his invaluable assistance in resolving this

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[3] The Special Master also suggested that a third solution was possible—that of a "fifty-fifty share or half and half." Supplemental Report, ¶ 27. The court deems this approach too arbitrary and notes that, unlike the other solutions offered, it is not backed up by an analysis of Thai law; it is rather, in Dr. Sompong's words, one "last thought that lingers in the mind of the Special Master." *Id.*

matter and orders the parties to pay his fee in equal shares, if they have not done so already. *See Fin One I*, 215 F.Supp.2d at 403.

Dated: April 30, 2003
New York, New York

SO ORDERED.

CONSTANCE BAKER MOTLEY

CONSTANCE BAKER MOTLEY
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 00 Civ. 6739 (CBM)

FINANCE ONE PUBLIC COMPANY LIMITED,

Plaintiff,

—against—

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Defendant.

ORDER

The court has received and reviewed the lists of candidates for a special master, to assist the court in determining whether defendant possessed an extra-contractual set-off right under Thai statutory, constitutional and/or administrative law, proposed by both parties in the above-captioned case. Having corresponded with Dr. Sompong Sucharitkul, D.C.L., Associate Dean and Distinguished Professor of International and Comparative Law at Golden Gate University in San Francisco and received assurances that he is qualified as an expert on Thai law, that he has no ties to either party that would render him biased in any way, and that he will be able to prepare a written report on the question for which his

assistance is necessary by January 15, 2003, the court is convinced that Dr. Sucharitkul is the best candidate for the role of special master.

Accordingly, it is hereby ORDERED that Dr. Sompong Sucharitkul is appointed as special master to assist the court in resolving the question articulated in the preceding paragraph.

It is FURTHER ORDERED that the parties are to assist Dr. Suchantkul in his endeavors by providing him with any and all documents already produced in this case that he may request; should there be any disputes regarding such requests; the parties are to consult the court in a timely manner.

Dated: October 30, 2002
New York, New York

SO ORDERED.

CONSTANCE BAKER MOTLEY

CONSTANCE BAKER MOTLEY
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 00 Civ. 6739 (CBM)

FINANCE ONE PUBLIC COMPANY LIMITED,

Plaintiff,

—against—

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Defendant.

OPINION AND ORDER

APPEARANCES:

Attorneys for Plaintiff:
Aaron Rubinstein and Michael M. Pomerantz
Kaye Scholer LLP

Attorneys for Defendant:
Jeffrey Q. Smith and Scott E. Eckas
King & Spalding

Motley, J.:

The dispute in this case involves a derivative trading relationship between plaintiff Finance One Public Company Limited ("Fin One"), which until its collapse in

1997 was the largest financial institution in Thailand, and defendant Lehman Brothers Special Financing, Inc. ("LBSF"), a corporate entity through which Lehman Brothers Inc. ("Lehman Brothers"), the investment banking firm, engages in international derivative transactions. At issue is whether LBSF was entitled to avoid paying $9.7 million it admittedly owed Fin One under their derivative trading contract by acquiring from a related Lehman Brothers entity certain negotiable debt instruments issued by Fin One and asserting Fin One's debt under those instruments as a set-off. Although the face value of the debt instruments LBSF acquired and asserted as a set-off was in the neighborhood of 59.7 million and thus purportedly erased LBSF's debt to Fin One almost in full, in reality the debt instruments LBSF acquired were virtually worthless due to Fin One's insolvency.

The parties dispute which law—New York or Thai—applies to the various claims and defenses at issue in this case. Because it would have been unnecessarily burdensome to require the parties to brief their already complex cross-motions for summary judgment under both New York and Thai law, the court directed the parties to brief the choice of law issues in advance of briefing the merits of their motions. The court resolved most of the choice of law issues in a memorandum opinion filed on December 4, 2001, holding that New York law controls whether LBSF is liable to Fin One under the derivative trading contract; that Thai law controls whether Fin One is liable to LBSF under the acquired debt instruments; that New York law controls whether the derivative trading contract affords LBSF the right to assert the acquired debt instruments as a set-off; and that the question of which law controls whether LBSF possessed an extra-contractual setoff right would be resolved by applying

New York's interest analysis. *See Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin. Inc.*, No. 00 Civ. 6739, 2001 WL 1543820 (Dec. 4, 2001) (hereinafter "December 4 Order").

The parties have now fully briefed the remaining choice of law issue as well as the merits of their cross-motions. For the reasons set forth more fully below, the court holds: (1) that the derivative trading contract does not afford LBSF the right to assert the acquired debt instruments as a set-off; (2) that the derivative trading contract does not expressly preclude LBSF from asserting the set-off; (3) that Thai law controls whether LBSF possessed an extra-contractual set-off right; (4) that it will be necessary for the court to appoint a special master to assist it in resolving the thorny question of whether LBSF possessed an extra-contractual set-off right under Thai statutory, constitutional, and administrative law; and (5) that LBSF is entitled to summary judgment with respect to Fin One's good faith and fair dealing claim.

BACKGROUND

Fin One is a publicly traded company organized under the laws of the Kingdom of Thailand. Headquartered in Bangkok, Fin One was—until it was shut down by the Thai government in 1997—the single largest financial institution in Thailand. As such, Fin One regularly engaged in interest rate and currency derivative transactions in order to hedge against risks associated with fluctuating interest and currency rates.

LBSF is a Delaware corporation headquartered in New York. LBSF is a wholly owned subsidiary of Lehman Brothers, the investment banking firm, and is one of the entities through which Lehman Brothers engages in international derivative transactions.

In 1995, Fin One and LBSF decided to pursue an ongoing derivative trading relationship, and in June of that year they negotiated and entered into a master contract governing the basic terms of that relationship. The parties executed an ISDA Master Agreement, which is a standard form contract created by the International Swaps and Derivatives Association for use by entities engaging in derivative trading. The ISDA Master Agreement itself contains no individually tailored terms, but it does contemplate the incorporation of additional schedules through which the parties could and did negotiate terms governing such contingencies as default, termination, settlement, and choice of law. The Master Agreement and its schedules were to be incorporated expressly into each of the individual interest rate and currency swap transactions executed by the parties, thus rendering it unnecessary for the parties to negotiate and agree to terms from scratch every time they wanted to execute a transaction.

Fin One and LBSF executed four interest rate and currency swap transactions between July 1995 and October 1996. Three of these transactions provided that the parties would exchange a certain amount of Thai baht for a certain amount of U.S. dollars on a specified future date, and one was a similar transaction involving the exchange of Thai baht and Japanese yen. Each of these transactions was documented by swap confirmation papers incorporating the terms of the Master Agreement and its schedules.

Beginning in late 1996, Southeast Asia became crippled by a severe financial crisis. Thailand, which had been one of the region's most prosperous economies in the early and mid-1990s, was among the nations hit hardest by this crisis. Interest rates soared, and the value of the Thai baht plummeted. By June 1997 Fin One was

insolvent, defaulting on promissory notes and other financial obligations to a multitude of creditors. In order to protect the remaining assets of Thailand's largely insolvent financial sector, the Thai Ministry of Finance stepped in and issued a series of orders beginning on June 26, 1997. Among other things, the Ministry of Finance ordered Fin One to suspend its operations indefinitely.

Although Fin One's overall financial condition was terrible, the soaring interest rates and plummeting baht had caused Fin One to do extraordinarily well in its four derivative trades with LBSF. By June 1997, LBSF owed Fin One almost $10 million as a result of those transactions.

Prior to the financial crisis, Fin One had routinely issued negotiable debt instruments known as bills of exchange. The holder of a bill of exchange is entitled to redeem the note for a certain sum of money on a specified future date. In September 1996, Fin One issued eight bills of exchange to Lehman Brothers (Thailand) Ltd. ("Lehman (Thailand)"), a Lehman Brothers entity incorporated and headquartered in Bangkok that regularly invests in the debt instruments of Thai financial institutions. Lehman (Thailand) subsequently acquired another four Fin One bills of exchange. On their face, these twelve bills of exchange were redeemable in late 1997 for a total of 305 million baht, but as Fin One became insolvent in mid 1997 the bills of exchange became nearly worthless.

In late June 1997, as it became increasingly clear that Fin One would not be able to weather the mounting financial crisis, Lehman (Thailand) sold its Fin One bills of exchange to LBSF. Though no cash changed hands between the two Lehman entities, LBSF purportedly paid Lehman (Thailand) close to face value for the

notes. LBSF and Lehman (Thailand) reflected payment for the transaction by crediting and debiting their respective intra-Lehman accounts.

On July 25, 1997, LBSF informed Fin One that it was terminating the derivative transactions based upon a "material adverse change," which Fin One agrees it was entitled to do under the Master Agreement. Four days later, LBSF informed Fin One that it had calculated its debt to Fin One under those terminated transactions to be 59.7 million but that it was asserting the bills of exchange it had acquired from Lehman (Thailand) as a set-off. According to LBSF, the set-off reduced its outstanding debt to Fin One from $9.7 million to just over $12,000.

Fin One filed the instant lawsuit against LBSF for breach of contract and breach of the duty of good faith and fair dealing in September 2000, claiming that LBSF had no right to erase its debt under the derivative transactions by asserting the bills of exchange as a set-off. The essence of Fin One's claims is that LBSF acquired the essentially worthless bills of exchange from its cousin in bad faith and that the putative set-off was prohibited by both New York, and Thai law.

DISCUSSION

A. The Master Agreement Does Not Give LBSF a Contractual Set-Off Right

LBSF first asserts that the Master Agreement itself entitles it to assert the bills of exchange as a set-off. The court previously held that New York law governs this issue pursuant to the agreement's choice-of-law clause. *See* December 4 Order at 1-2.

LBSF argues that an express contractual set-off right can be found in paragraph 6(e) of the Master Agreement. Section 6 of the agreement—entitled "Early Termination"—sets forth various terms that govern in the event that one of the parties elects to terminate the agreement prior to its expiration. Paragraph 6(e)—entitled "Payments on Early Termination"—states in relevant part that "[t]he amount, if any, payable in respect of an Early Termination Date and determined pursuant to this Section will be subject to any, Set-Off." LBSF contends that this language gives it broad contractual authority to assert the bills of exchange as a set-off.

The flaw in LBSF's argument is that the term "Set-Off" is defined elsewhere in the Master Agreement to mean any "set-off, offset, combination of accounts, right of retention or withholding or similar right or requirement to which the payer of an amount under section 6 is entitled or subject (whether arising under this Agreement, another contract, applicable law or otherwise) that is exercised by, or imposed on, such payer." The key is the language in the parenthetical: "any Set-off" in section 6(e) means any set-off "arising under this Agreement" (or by operation of law). Read together with this definitional clarification, section 6(c) effectively says only that, upon the early termination of the agreement, any payment that is due will be subject to any set-off that arises *elsewhere* under the agreement (or by operation of law). After all, if the reference to "any Set-Off" in section 6(e) itself vested the parties with a broad contractual set-off right, then it never would be relevant whether other contracts executed by the parties or by operation of applicable law entitled the parties to assert a set-off, and the reference in the definition of set-off to rights arising "under . . . another contract [or under] applicable law" would be rendered superfluous. *See New*

York v. Oneida Indian Nation of New York, 90 F.3d 58, 63 (2d Cir. 1996) (holding under New York law that it is "the cardinal principle of contract construction that all provisions of a contract should be given effect if possible"). Accordingly, the court holds that the reference to "Set-Off" in section 6(c) does not create an independent contractual set-off right but rather simply acknowledges the existence of any contractual set-off right that may have been incorporated into the Master Agreement through additional schedules negotiated by the parties.[1]

The court notes that this plain language reading of the agreement is reinforced by the various practice commentaries that have parsed the terms of the form contract the parties utilized. All of these practice commentaries state that the reference to "Set-Off" in paragraph 6(e) of the form contract is simply a "place-holder" for any set-off rights that am negotiated in separate schedules or that exist by operation of law. *See* International Swap Dealers Association, *User's Guide to the 1992 ISDA Master Agreements* 24 (1993) (payments under section 6(e) are subject to any set-off that may apply "by operation of law or that the parties may set forth in a schedule"); *id.* at 54 ("Parties may use th[e] reference [in section 6(c) to "Set-Off") as the avenue for augmenting [the Master Agreement] in the Schedule by adding a form of set-off clause they find acceptable.")[2]; Anthony

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[1] The parties negotiated numerous additional schedules pertaining to such contingencies as default, termination, settlement, and choice of law, but nothing in any of the schedules gives the parties a contractual set-off right.

[2] Indeed, in this User's Guide the ISDA warned presciently that "without an effective set-off clause, one party might be required to make payment" to the other "while, at the same time, the [first] party may not have any realistic expectation of receiving payments owed to it by the [other party] under other agreements." *Id.*

C. Gooch, *Documentation for Derivatives*, 88 (Euromoney Publications 1993) (under section 6(e) early termination payments are "subject to any Set-off that the parties have provided for contractually (in the Schedule to their Agreement or otherwise) or that is available under applicable law"); Joshua D. Cohn, *ISDA Master Agreements: 1992 and 1987 Versions Described and Compared* 10 (Practicing Law Institute 1996) ("A set-off provision was considered, but not introduced in the [ISDA Master Agreement]. A 'place-holder' reference to set-off (to be definied by the parties or by operation of law) is contained in section 6(c)."); *id.* at 16 ("Parties must negotiate the existence or not and the breadth of, as well as the mechanism for, set-off); Barry Taylor-Brill, *Negotiating and Opining on ISDA Masters* 117 ("The ISDA Master does not include a set-off clause with respect to other obligations of the parties.").

B. The Master Agreement Does Not Preclude LBSF From Asserting an Extra-Contractual Set-Off Right

Fin One argues not only that the Master Agreement does not entitle LBSF to assert the bills of exchange as a set-off, but also that the Master Agreement expressly forbids LBSF from doing so. Fin One points to paragraph 8(a), which requires all payments under the contract to be made in the applicable "Contractual Currency," and paragraph 1(g) of the appended schedule, which states that the "Contractual Currency" is U.S. dollars. Fin One contends that LBSF was therefore required to make payment in U.S. dollars, not by asserting bills of exchange denominated in Thai baht as a set-off.

As LBSF points out, however, paragraph 1(g) of the schedule also entitles it—upon the occurrence of an "Event of Default"—to make payment in any currency in

which any transaction had been executed, including Thai baht. (Fin One's insolvency certainly had been an Event of Default as defined in paragraph 5(a)(vii)(2) of the Master Agreement.) Fin One counters that LBSF informed it in writing that it was terminating the contract because of a "material adverse change," not because of an Event of Default. Nothing in paragraph 1(g) of the schedule, however, required LBSF to cite the Event of Default expressly before tendering payment in Thai baht (or, in this case, by asserting bills of exchange denominated in Thai baht as a set-off).

Moreover, Fin One's "Contractual Currency" argument is substantially in tension with the plain language of the definitions section of the contract, which recognizes any right to set-off arising "under . . . another contract, applicable law or otherwise." It is telling that this term does not require the obligation being asserted as a set-off to be denominated in any particular currency. Clearly, the schedule's "Contractual Currency" provision was entitled to apply only to an actual cash payment, not to an asserted set-off.

Accordingly, the court holds that nothing in the Master Agreement precludes LBSF from asserting any set-off to which it might be entitled by operation of law.

C. Thai Law Governs Whether LBSF Enjoys an Extra-Contractual Set-Off Right

The court previously held that New York's "interest" analysis must be applied to determine which law—New York or Thai—governs whether LBSF enjoys an extra-contractual set-off right by operation of law. *See* December 4 Order at 3-4. New York's interest analysis is a "flexible approach intended to give controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties,

has the greatest concern with the specific issue raised in the litigation." *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66. 72 (1993) (internal quotations omitted).

LBSF contends that New York law should govern, arguing that New York has a paramount interest (1) in applying its law to disputes arising out of international finance transactions between its citizens (LBSF is headquartered in New York) and foreign companies; (2) in "insuring the stability and predictability of international financial markets"; and (3) in "maintaining its role as the world's leading financial center." LBSF Br. at 6. The court agrees that these are significant interests worthy of consideration. The problem with LBSF's argument, however, is that Thailand has more or less an equal interest in having its law applied to this dispute for the same three reasons. (Bangkok may not literally be "the world's leading financial center," but it certainly is a very important financial center, especially in Southeast Asia.)

More importantly, the circumstances surrounding the dire financial crisis that crippled Southeast Asia in 1997—thus directly giving rise to this dispute—vest Thailand with a mammoth interest in having its law applied, one that easily dwarfs any competing interest New York might have. In late June of that year, the Thai government attempted to stabilize its economy by ordering fifty-eight of its financial institutions—including Fin One, then its largest—to cease operations. The Thai Ministry of Finance specifically ordered Fin One not to make tiny payments on its outstanding debts, including its bills of exchange, and not to allow its debtors to assert those bills of exchange as set-offs. The Ministry of Finance stated that it was taking such extreme measures "[i]n order to alleviate the problems surrounding the financial standing and operations of [Fin One] and so

as to ensure the stability and well-being of the financial system as a whole." Thai Ministry of Finance. *Order of Cessation of Business Operation of Finance One Public Co. Ltd.*, No. 139/2540, at 1 (Jun. 26, 1997); *see also* Thai Ministry of Finance, *Order of Cessation of Business Operation of Finance One Public Co. Ltd.*, No. 158/2540 (Jul. 25, 1997) (extending the June 26 order indefinitely). As will be discussed in more detail below, it is far from clear whether the Ministry of Finance had either the statutory or constitutional authority to preclude LBSF from asserting whatever set-off right it may have enjoyed under the Thai Civil and Commercial Code. It is quite clear, however, that—whatever the outcome of this case under Thai law—Thailand's interest in salvaging the viability of its largest financial institutions and resuscitating its economy is far superior to any interest New York may have in this litigation.

Accordingly, the court holds that Thai law controls whether LBSF enjoys an extra-contractual set-off right by operation of law.

D. Identifying and Applying Thai Law

We thus come to the ultimate issue in this case: whether, under Thai law, LBSF was entitled to assert the bills of exchange it acquired from Lehman (Thailand) to set-off its debt to Fin One under the derivative trading transactions. LBSF points to section 341 of the Thai Civil and Commercial Code, which generally permits set-off:

> If two persons are bound to each other by obligations whose subject is of the same kind and both of which are due, either debtor may be discharged from his obligation by set-off to the extent to which the amounts of the obligations correspond, unless

> the nature of one of the obligations does not admit of it.

Fin One, on the other hand, points to the June 26 and July 25 Ministry of Finance orders, arguing that these orders expressly preclude LBSF's ability to assert the bills of exchange as a set-off against the debt it owed Fin One. The parties disagree about whether the Ministry of Finance orders apply to LBSF, as opposed to applying only to Fin One, and about whether the Ministry of Finance enjoyed the requisite statutory and constitutional authority to preclude LBSF from asserting the set-off to which it arguably was entitled under the Civil and Commercial Code.[3]

Fin One has offered the expert testimony of Suchart Sooksumitr, a former Judge on the Supreme Court of Thailand. Judge Sooksumitr has testified that the Ministry of Finance orders apply to any entity doing business with Fin One, not just to Fin One itself, and that the orders were a valid exercise of the authority delegated by the Thai Parliment to the Ministry of Finance to regulate financial institutions. LBSF has offered the expert testimony of Sahaton Rattanapijit, a law professor at Thammasat University in Bangkok. Professor Rattanapijit has testified that the Ministry of Finance has no jurisdiction to order LBSF to do or refrain from doing anything, and that the Ministry of Finance certainly has no authority to strip LBSF of set-off rights it enjoys under the Civil and Commercial Code. Judge Sooksurnitr and Professor Rattanapijit have both cited a plethora of Thai Supreme Court opinions, and they have engaged in a spirited debate about the proper interpretation of

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[3] The parties also dispute whether the set-off was proper under the Civil and Commercial Code. Fin One contends, and LBSF disagrees, that the set-off was asserted in bad faith and that the requisite mutuality was lacking.

those opinions and how to apply them to the apparently thorny issues of Thai administrative law presented here.

The fact that both of these esteemed experts have argued their respective positions cogently presents the court with a quandary: whom to believe? To be sure, the court is not bound to limit its inquiry to the opinions espoused by the parties' experts. Federal Rule of Civil Procedure 44.1 allows district courts to determine foreign law by considering "any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Indeed, the Second Circuit has specifically "urge[d] district courts to invoke the flexible provisions of Rule 44.1 to determine issues relating to the law of foreign nations." *Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir. 1998). In the instant case this is easier said than done, however, because the court's library does not carry Thai reporters, nor are they available on Westlaw or Lexis-Nexis. Further compounding the problem, neither the undersigned nor her capable law clerks speak much Thai.

Given the rather unusual complexity of the foreign law issues presented in this case, and given that almost $10 million rides on their proper resolution, the court believes it has no choice but to appoint a special master to assist it in identifying and applying Thai law to the parties' claims and defenses. Accordingly, the parties are hereby ORDERED to meet and confer on or before September 20, 2002 and, if possible, to identify one or more mutually agreeable candidates for special master. If the parties are unable to stipulate to the acceptability of any candidates by September 20, then the court will appoint a special master of its own choosing shortly thereafter. In any event, the special master's fees shall be paid by the parties in equal shares.

E. The Good Faith and Fair Dealing Claim

LBSF has also moved for summary judgment with respect to Fin One's good faith and fair dealing claim. LBSF argues correctly that a plaintiff may not maintain a good faith and fair dealing claim where that claim is based upon the same factual allegations and seeks the same damages as the plaintiff's claim for breach of an express provision of the contract. *See EUA Cogenex v. North Rockland Cent. Sch. Dist.*, 124 F. Supp. 2d 861, 873 (S.D.N.Y. 2000) (under New York law, a duty of good faith and fair dealing claim "may be brought, if at all, only if it is based on allegations different than those underlying the accompanying breach of contract claim"); *see also Cross & Cross Props., Ltd. v. Everett Allied Co.*, 886 F2d 497, 502 (2d Cir. 1989) ("A claim for breach of the implied covenant [under New York law] will be dismissed as redundant where the conduct allegedly violating the implied covenant is also the predicate for breach of covenant of an express provision of the underlying contract.").

The only authority Fin One cites in response is *deCiutiis v. Nynex Corp.*, No. 95 Civ. 9745, 1996 WL 512150 (S.D.N.Y. Sep. 9, 1996). However, that case merely held that a plaintiff may assert a duty of good faith and fair dealing claim alongside a breach of contract claim where the duty of good faith and fair dealing claim seeks only to constrain decisionmaking discretion granted to one party through the contract. *See* id. at *3. That scenario has nothing to do with the facts of this case and casts no doubt on the general rule that a plaintiff cannot assert a breach of contract and a breach of good faith and fair dealing claim redundantly.

Accordingly, LBSF's motion for summary judgment with respect to Fin One's good faith and fair dealing

claim is hereby GRANTED, and that claim is hereby DISMISSED with prejudice.

CONCLUSION

For the foregoing reasons, the court holds: (1) that the derivative trading contract does not afford LBSF the right to assert the acquired debt instruments as a set-off; (2) that the derivative trading contract does not expressly preclude LBSF from asserting the set-off; (3) that Thai law controls whether LRP possessed an extra-contractual setoff right; (4) that it will be necessary for the court to appoint a special master to assist it in resolving the thorny question of whether LBSF possessed an extra-contractual set-off right under Thai statutory, constitutional, and administrative law; and (5) that LBSF is entitled to summary judgment with respect to Fin One's good faith and fair dealing claim. The parties shall meet and confer on or before September 20, 2002 and, if possible, identify one or more mutually agreeable candidates for special master.

Dated: August 2, 2002
New York, New York

SO ORDERED.

CONSTANCE BAKER MOTLEY

CONSTANCE BAKER MOTLEY
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 00 Civ. 6739 (CBM)

FINANCE ONE PUBLIC COMPANY LIMITED,

Plaintiff,

—against—

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

The parties in the above-captioned breach of contract action have expressed their intent to file cross-motions for summary judgment. Because they dispute which law—New York or Thai—applies to the various claims and defenses at issue, and because it would be unnecessarily burdensome to require the parties to brief their motions under both New York and Thai law if Thai law does not in fact apply, the court directed the parties to brief the choice of law issues in advance of briefing the merits of their summary judgment motions. This preliminary round of choice of law briefing is now complete.

The parties' briefs reveal that the merits of their motions will raise three separate questions, each of which presents its own distinct choice of law issues: (1) whether defendant is liable to plaintiff under the ISDA Master Agreement and the related derivative transactions; (2) whether plaintiff is liable to defendant under the Bills of Exchange (that is, whether defendant acquired its interest in the Bills of Exchange in bad faith, whether there was adequate consideration, whether the Bills of Exchange are due and payable, etc.); and (3) whether defendant may assert in this proceeding plaintiffs liability to it, if any, under the Bills of Exchange through the affirmative defense of setoff. Because this is a diversity action, the court determines which law governs these questions by applying New York's choice of law rules. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

The schedule incorporated into the ISDA Master Agreement contains an express choice of law clause: "This agreement will be governed by and construed in accordance with the laws of the State of New York (without reference to choice of law doctrine)." Compl. Ex. 1, Sched. ¶ 4(h). Because this choice of law clause is enforceable under New York's choice of law regime, *see* N.Y. Gen. Oblig. Law § 5-1401, New York law governs the first question—whether defendant is liable to plaintiff under the ISDA Master Agreement and the related derivative transactions.

Unlike the ISDA Master Agreement, the Bills of Exchange contain no express choice of law provision. Therefore, in order to determine which law governs whether plaintiff is liable to defendant under the Bills of Exchange, the court applies New York's choice of law rule for contracts: "[T]he interpretation and validity of a contract is governed by the law of the jurisdiction

which is the 'center of gravity' of the transaction." *Alderman v. Pan Am World Airways*, 169 F.3d 99, 103 (2d Cir. 1999) (applying New York law). Under this approach—which is also referred to as the "grouping of contacts" approach—the court "may consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties." *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1539 (2d Cir. 1997) (applying New York law). Here, the Bills of Exchange are denominated in Thāi baht and were issued in Thailand by a Thai company to Thai companies. Accordingly, the court finds that the "center of gravity" of the Bills of Exchange is Thailand, and that Thai law therefore governs whether plaintiff is liable to defendant under the Bills of Exchange.[1]

It is far less clear which law governs whether defendant may assert in this proceeding plaintiff's liability to it under the Bills of Exchange through the affirmative defense of setoff. This question is complicated by the fact that there are at least three possible sources of defendant's putative setoff right: the ISDA Master Agreement itself, statutory law, and general common law equitable principles.

To the extent that defendant is arguing that it has an express contractual right to setoff under the ISDA Master Agreement, there is no doubt that the agreement's choice of law clause governs and that New York law

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[1] Applying section 214 of the Restatement (Second) of Conflicts of Laws—which provides that "[t]he obligations of the maker of a note and of the acceptor of a draft are determined . . . by the local law of the state designated in the instrument as the place of payment"—would yield the same result because the Bills of Exchange designate that their place of payment is Bangkok.

therefore applies. In other words, when briefing the issue of whether the language contained in paragraph 6(e), paragraph 14, or any other provision of the ISDA Master Agreement entitles defendant to assert the Bills of Exchange as a setoff the parties should rely on New York law—for example, by parsing the contractual language through the lens of canons of construction utilized by New York courts.[2]

Even if the ISDA Master Agreement itself creates no setoff right, however, defendant still may enjoy a setoff right by operation of law—perhaps under statutory law, *see, e.g.*, N.Y. Debt. & Cred. Law § 151, perhaps under common law equitable principles, or perhaps based on some other source of law. The thorny question is: Which jurisdiction's law governs whether defendant enjoys an extra-contractual setoff right by operation of law?

Defendant argues that the choice of law clause in its contract with plaintiff is sufficiently broad to cover its asserted setoff right arising *outside* of the contract, and that New York law therefore governs whether it enjoys an extra-contractual setoff right. Defendant relies on *Turtur v. Rothschild Registry Int'l, Inc.*, 26 F.3d 304 (2d Cir. 1994), in which the Second Circuit held that the choice of law clause at issue in that case—which covered any controversy "arising out of or relating to" the contract—was sufficiently broad to encompass tort claims related to the contract, not just the contract claim itself. *See id.* at 309-10. Unlike in *Turtur*, however, the choice of law clause at issue here does not contain the broad "arising out of or relating to" language, but rather states simply that the contract "will be governed by and

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[2] Though the court will reserve judgment until the parties' motions have been briefed in full, the court notes that plaintiff's argument that the ISDA Master Agreement does not arm defendant with a contractual setoff right appears to have merit.

construed in accordance with the laws of the State of New York." The Second Circuit has squarely held—in cases decided after *Turtur*—that identical choice of law clause language is too narrow to control which law applies to alleged extra-contractual rights. *See Krock v. Lipsay*, 97 F.3d 641, 654 (2d Cir. 1996); *Valley Juice Ltd., Inc. v. Evian Waters of France*, 87 F.3d 604, 611 (2d Cir. 1996). Accordingly, this court holds that the choice of law clause contained in the schedule to the ISDA Master Agreement has no bearing on which law governs any extra-contractual setoff right that defendant may enjoy by operation of law.

Plaintiff urges the court to follow a well-established line of bankruptcy court cases holding that the availability of setoff is determined according to "the law of the state where the relevant facts transpired." *E.g., In re Westchester Structures*, 181 B.R. 730, 740 (Bankr. S.D.N.Y. 1995). These bankruptcy cases are inapposite, however, because none of them even purports to divine this choice of law rule from the law of the state in which the bankruptcy court sits. Unlike in the instant diversity action—in which the court is required under *Klaxon* to apply New York's choice of law rules—in the bankruptcy cases cited by plaintiff the courts, in construing the federal bankruptcy code, were free to follow their own federal common law choice of law regime.[3] Because

[3] Plaintiff correctly observes that the bankruptcy code does not create an independent federal setoff right, but rather incorporates existing state setoff rights. *See* 11 U.S.C. § 533. The court imagines, however, that once incorporated into the bankruptcy code, such setoff rights essentially become creatures of federal law—if only for conflicts purposes—thus enabling courts interpreting them to employ federal common law choice of law principles. This is the only way to explain why bankruptcy courts consider themselves free, unlike this court, to decide which jurisdiction's setoff rules apply without regard to the choice of law principles of the state in which they sit.

here the court is constrained to use New York's choice of law rules, this federal common law choice of law regime cannot apply.

The question thus remains: Which choice of law rule would New York courts employ in determining which jurisdiction's law governs whether defendant enjoys an extra-contractual right to assert a setoff in this proceeding? The parties have neither cited any New York cases addressing choice of law in the setoff context nor did the court's independent research reveal any. In the absence of controlling authority, the court concludes that it should apply New York's "interest analysis" choice of law regime, which identifies and applies the law of the jurisdiction with the greatest interest in the dispute. *See, e.g., Cooney v. Osgood Machinery, Inc.*, 81 N.Y.2d 66, 72 (N.Y. 1993) (interest analysis seeks "to effect the law of the jurisdiction having the greatest interest in resolving the particular issue"). The New York Court of Appeals has made clear that interest analysis is appropriate where public rights are at stake (such as in tort disputes) versus where private rights are at stake (such as in contract disputes). *See Allstate Ins. Co. v. Stolarz*, 81 N.Y.2d 219, 225-26 (N.Y. 1993). Because defendant's putative extra-contractual setoff right—which can only arise by operation of law—sounds more in public law than in private law, the court concludes that New York courts would resolve this choice of law issue through interest analysis.

Of course, determining which jurisdiction—New York or Thailand—has a greater interest in whether defendant enjoys a setoff right arising outside of the ISDA Master Agreement requires in part a careful and detailed analysis of the law of both jurisdictions with respect to extra-contractual setoff rights. Because the parties' briefs did not focus on the nature and scope of New York

and Thai law in this regard—indeed, the parties were not asked to—the court unfortunately is not fully equipped at this juncture to resolve this particular choice of law question.[4] Accordingly, the parties are hereby instructed to include in their forthcoming briefs an analysis of which jurisdiction has the greater interest in the application of its setoff law.

It is hereby ORDERED that:

1. Plaintiff shall move for summary judgment and file and serve a supporting brief (not to exceed 25 pages) on or before January 11, 2002;

2. Defendant shall file and serve a single brief (not to exceed 30 pages) in opposition to plaintiff's motion for summary judgment and in support of its cross-motion for summary judgment on or before February 1, 2002;

3. Plaintiff shall file and serve a brief (not to exceed 20 pages) in opposition to defendant's cross-motion on or before February 22, 2002; and

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[4] The parties need not devote any further attention to the other choice of law issues discussed in this opinion. The court has decided that New York law controls whether defendant is liable to plaintiff under the ISDA Master Agreement; that Thai law controls whether plaintiff is liable to defendant under the Bills of Exchange; and that New York law controls whether the ISDA Master Agreement—as opposed to some other source of law affords defendant a right to assert the Bills of Exchange as a setoff in this proceeding. The question of which law controls whether defendant enjoys an extra-contractual setoff right by operation of law remains unanswered for the moment, and the court will resolve this issue by applying New York's interest analysis.

4. Defendant shall file and serve a reply brief (not to exceed 15 pages) on or before March 15, 2002.

The cross-motions will be taken on submission, and the court will decide them without oral argument.

Dated: November 30, 2001
New York, New York

SO ORDERED.

CONSTANCE BAKER MOTLEY

CONSTANCE BAKER MOTLEY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed January 8, 2006

Date:	12/30/05
Docket Number:	03-9049-cv
Short Title:	Finance One Public v. Lehman Brothers
DC Docket Number:	00-cv-6739
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Constance Motle

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of January two thousand six.

Finance One v. Lehman Brothers
03-9049-cv-(L), 03-9096-cv(XAP)

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Appellee-cross-Appellant Finance One Public Company Limited. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court:

Roseann B. MacKechnie, Clerk

By TRACY W. YOUNG

Motion Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed July 12, 2005
Docket Nos. 03-9049(L), 03-9096(XAP)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 12th day of July, two thousand and five.

Before: Hon. John M. Walker, Jr., *Chief Judge*
Hon. Rosemary S. Pooler,
Hon. Richard C. Wesley,
Circuit Judges

FINANCE ONE PUBLIC COMPANY LIMITED,
Plaintiff-Appellee-Cross-Appellant,

—v.—

LEHMAN BROTHERS SPECIAL FINANCING, INC.,
Defendant-Appellant-Cross-Appellee,

SOMPONG, SUCHARITKUL, Dr.,

*Special Master.**

JUDGMENT

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is REVERSED and REMANDED to enter judgment for defendant in accordance with the opinion of this court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by

TRACY W. YOUNG

Tracy W. Young
Motions Staff Attorney

ISSUED AS MANDATE: 1/25/06

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* The official caption currently lists the special master before the parties. The Clerk of the Court is instructed to alter the official caption to conform to that appearing here.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 00 Civ. 6739 (CMB)
Filed March 9, 2006

FINANCE ONE PUBLIC COMPANY LIMITED,

Plaintiff,

—against—

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Defendant.

PROPOSED JUDGMENT

In accordance with the January 25, 2006 Mandate of the United States Court of Appeals for the Second Circuit reversing the September 3, 2003 Judgment of the United States District Court for the Southern District of New York, it is hereby ORDERED, ADJUDGED AND DECREED that, for the reasons stated in the July 12, 2005 opinion of the Second Circuit Court of Appeals, Judgment is entered in favor of Defendant.

SO ORDERED

[Illegible]
United States District Judge

Dated: March 7, 2006
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 00 Civ. 6739

FINANCE ONE PUBLIC COMPANY LIMITED,

Plaintiff,

—against—

LEHMAN BROTHERS SPECIAL FINANCING INC.,

Defendant.

REPORT OF SPECIAL MASTER TO THE COURT, PROFESSOR SOMPONG SUCHARITKUL, D.C.L.

I. Introduction

1. This report is submitted to the Hon. Justice Constance Baker Motley, United States District Judge, pursuant to the Order No. 00 Civ. 6739 (CBM), dated October 30, 2002, appointing Professor Sompong Sucharitkul, D.C.L. as Special Master to provide necessary assistance to the Court by January 15, 2003 on questions of Thai statutory, constitutional and administrative law regarding the legal effect or consequence of the purported exercise of extra-contractual set-off right by Lehman Brothers Special Financing Inc. (LBSF), the Defendant, against Finance One Public Company Limited (Fin One), the Plaintiff.

2. The Special Master, author of this report, has been amply assisted by both parties who promptly made available to the Rapporteur all documents already produced in the case under review. In this connection the Special Master acknowledges with deepest appreciation the generous and helpful cooperation of both parties.

II. Certain Uncontested Facts of the Case

3. Both parties, including the opinions of their respective expert witnesses, appear to have reached an agreement on several of the material facts of the case now pending before the District Court. In order to analyze lucidly the crucial questions on which the Special Master has been instructed to provide assistance by way of a considered opinion, it is useful and also necessary to recapitulate some of the salient facts commonly admitted by both parties, albeit not without some slight discrepancies in regard to the precise date or dates of certain events or occurrences. In particular, it would appear significant if not indeed critical to ascertain the following relevant dates:

(a) When Fin One was actually ordered to suspend its business operations: June 24, 25, 26 or 27, 1997;

(b) When Fin One's 12 Bills of Exchange of three different maturity dates (9/26/97, 3/10/97 and 1/12/98) were actually and effectively transferred: (i) June 24 or 25, 1997 during conversations on the purchase, or (ii) on June 27, 1997 the date of the fax sent from Hong Kong by Lehman Brothers (Hong Kong) to the Bangkok Bank requesting execution of endorsement as soon as possible, or (iii) the actual date of endorsement thereafter;

(c) When LBSF presented Fin One's Bill of Exchange (July 25, 1997 prior to any of their maturity dates, whereupon Fin One stated unequivocally that it would not redeem them and pay LBSF). The defendant LBSF filed a notice of dishonour and formal protest with the Thai Police Department in accordance with Thai Civil and Commercial Code, sections 961 to 963.

4. Such are some of the material facts advanced or admitted by both parties and their respective expert witnesses with a margin of a few days discrepancies, which may or may not make my difference *ratione temporis*. These three different dates or sets of dates are thus noted as marking the occurrences of vital events in the process of chronological appreciation of significant happenings.

III. Slight Discrepancies regarding "Effective Dates"

5. To mention one of the dates, on which the suspension order of the business operations of Fin One was supposed to have taken place, for instance, in Exhibit 5 of the Reply Affidavits of Professor Suhaton Pattanapichit and Kittivalai Charoensombut-Amorn of May 14, 2002, the defendant LBSF attached a Press Release of the Financial Sector Restructuring Authority (FRA), dated December 8, 1997, in both the original Thai version and the English official translation. This Press Release specified Finance One Public Co. Ltd., the Plaintiff in this case, as one of the first 16 companies suspended on June 24, 1997, and that together with 42 other finance companies suspended on a later date (August 5, 1997), only two were given approval in

respect of their rehabilitation plan, namely Bangkok Investment Public Co. Ltd. and Kiatnakin Finance and Securities Public Co. Ltd. There was no discrepancy between the original Thai version and the official English translation of the Press Release announcing suspension of business operations of Fin One on June 24, 1997, by the very admission of the defendant LBSF. It was not contested that as from December 8, 1997, the date of this Press Release by the FRA, the business operations of Fin One were suspended on June 24, 1997. As this date was cited by the defendant LBSF without objection, LBSF could not be heard to contradict the effect of the Ministerial Order suspending the business operation of Fin One as of June 24, and certainly by June 25, 1997, and that this provisional or indefinite suspension order a became permanent or absolute cessation for Fin One's business operations as of July 25, 1997.

6. Whether or not a later date, e.g., June 25, 26 or 27 or thereafter was to be adopted as the effective date of suspension in the final analysis, it is clear that by June 24 or 25, or at the very latest by June 26 or 27, no one could be heard, let alone the defendant, having cited the Press Release of the FRA of December 8, 1997, to challenge the effect of the order suspending Fin One's business operations indefinitely, or at any rate provisionally, until July 25, whereupon this temporary or indefinite suspension was transformed into a permanent and absolute interruption or cessation of business operations for Fin One, along with 15 other finance companies, suspended since June 24 or 25, 1997. Nor should it make any difference if the date June 24 or 25 was in fact effectively put off until June 26 or even 27, 1997. The alleged transfer of three series of Fin One's 12 Bills of Exchange was not endorsed prior to June 27, 1997 when it became

public knowledge that Fin One had suspended its business operations.

7. The purchase of Fin One's 12 Bills of Exchange from Lehman (Thailand) by Lehman Brothers (Hong Kong) referred to in paragraph 3(b) above, was reportedly negotiated on June 24 and/or 25, but no endorsement was instructed, authorized or executed before June 27, 1997 or until June 27, 1997 at the very earliest. It is unmistakably clear in the absence of evidence to the contrary that the transfer of the 12 Bills of Exchange could not have occurred prior to the latest date on which Fin One's business operations were suspended by Order of the Ministry of Finance of Thailand, along with 15 other finance companies in similarly precarious situations.

8. The last date mentioned in paragraph 3(c) was July 25, 1997, on which LBSF presented, before their maturity dates, the three sets of altogether 12 Bills of Exchange issued by Fin One. This date coincided with the very day on which LBSF informed Fin One that it was terminating the derivative transactions based upon a "material adverse change" which Fin One agreed it was entitled to do under the Master Agreement. It is to be recalled that LBSF also filed a notice of dishonour and formal protest with the Thai Police Department as specifically mentioned in paragraph 3(c) above. Having filed a notice of dishonour against Fin One in accordance with Thai Civil and Commercial Code sections 961 to 963, LBSF further took upon itself four days later on July 29, 1997—within the statutory period but more than one month after Fin One was ordered to suspend and subsequently to cease its business operations altogether—to inform Fin One that it had unilaterally calculated its debt to Fin One under those terminated

transactions to be in the amount of US$9.7 million, but that it was asserting the 12 Bills of Exchange it had acquired from Fin One through Lehman (Thailand) and Lehman (Hong Kong) as a set-off. According to LBSF's own calculation, this set-off reduced its outstanding debt to Fin One to just over US$12,000.

IV. Contentions of the Parties

9. The parties appear to have understood, as found by the Court, that

> (a) The Master Agreement does not give LBSF a contractual set off right; and that
>
> (b) The Master Agreement does not preclude LBSF from asserting and extra-contractual set-off right; and
>
> (c) In addition, the Court has ruled that Thai law controls whether LBSF enjoys an extra-contractual set-off right by operation of law.

10. The ultimate issue in this case, as identified by the Court, is whether under Thai law, LBSF was entitled to assert the 12 Bills of Exchange it acquired from Lehman (Thailand) on or after June 27, 1997 through a facsimile order by Lehman (Hong Kong) on June 27, 1997 to set-off its debt to Fin One under the derivative trading transaction on July 29, 1997. It is submitted that even an affirmative answer to the question would be inconclusive, i.e., even on the assumption that the answer were to be in the affirmative, further analysis would still be required. Of course, the answer to the question still remains to be examined in the context of the prevailing applicable fiscal law and policy of Thailand, governing the tightening of controls by the Ministry of Finance and

the Bank of Thailand of Fin One, as one of the most prominent finance companies among the first group of 16 companies ordered to suspend business operations. Since July 25, 1997, this provisional suspension was transformed into a definite and absolute order of termination or cessation of business operations. The Special Master in this case finds that an affirmative ruling on the extra-contractual right of set-off would still not dispose of the extent or quantum, if any, of the right acquired by LBSF to set off against the debt owed to Fin One, which in LBSF's own estimation was US $9.7 million.

V. Modalities

11. There appear to be at least two stages in this process of inquiry into the ultimate issue, as identified by the Court. Whether or not LBSF is entitled on its own, unilaterally and unassisted by any competent national fiscal authority, to assess the value of the yet immature 12 Bills of Exchange, as LBSF apparently did, with the amazing result that after subtraction of the suggested set-off the outstanding debt LBSF owed to Fin One would have been reduced to just over US$12,000 in accordance with LBSF's calculation. Regardless of this determination, it is still not for LBSF, single-handedly and exclusively, to exercise the prerogative of peremptory unilateral valuation of the yet immature Bills of Exchange it had acquired from its subsidiary Lehman (Thailand).

12. Before attempting to answer the questions of entitlement of LBSF to setoff as a matter of an extra-contractual right, let us examine what is meant by an extra-contractual right. A contractual right is a right provided or stipulated in the Master Agreement; a contrac-

tual right is a right *in personam* against the other co-contractor or contracting party. It is not a right *in rem* or a right *erga omnes*, against the whole world, but a right with a correlative duty that is only meaningful if its counter-part possessed the contents of the corresponding or correlative obligation which could be identified and objectively quantified. Likewise, an extra-contractual right is not a right *in rem*, but a right *in personam* relative to the other contracting party.

13. The entitlement of LBSF, if any, cannot as such exist or pre-exist *in vacuum*. It cannot exist in isolation without any duty-bearer to discharge the corresponding or correlative obligation. To assert as LBSF did, fully supported by its expert witness on Thai law, that LBSF is entitled to an extra-contractual set-off right, would still be meaningless unless LBSF could also prove that Fin One, having been indefinitely ordered to suspend its business operations since June 25, 1997 (or June 27, 1997 at the very latest) and definitely to cease permanently its business operations since July 25, 1997, was still able under the applicable relevant Thai law to continue to bear the responsibility of honouring its debts or obligations under any Bills of Exchange yet immature or even those already mature but as yet unredeemed. As admitted by both parties, the Order of the Ministry of Finance of June 25, 1997, although not binding directly on LBSF, was undoubtedly binding on all 16 finance companies whose business operations were suspended by that ministerial order. The direct or less-direct result of this executive order is uncontested. It entailed the intended legal effect that Fin One, along with 15 other finance companies listed in the Order, was no longer qualified, nor was it any longer in the position to, fulfill its existing or pre-existing or future obligations, nor even to honour or redeem its Bills of Exchange or other

forms of negotiable instruments without the prior approval of the supervisor or comptroller appointed by the Ministry of Finance and the Bank of Thailand under the auspices of the FRA (Financial Sector Restructuring Authority).

14. This, in short, was the reason Fin One was not in the position to honour its 12 immature Bills of Exchange when presented by LBSF on July 25, 1997. Fin One was fully aware that, even if it were to agree prematurely to honor the 12 Bills of Exchange on July 25, 1997 by reducing them at their proportionally reduced face value (i.e., less the time needed for their incubation to reach maturity), such a transaction, swap or set-off would still have been subject to cancellation or invalidation by any one of the administering authorities overseeing the suspended operations on Fin One. The cancellation or invalidation would have been on grounds of collusion or conspiracy to curtail or prejudice the rights of other creditors of Fin One, this even long before the commencement of the actual bankruptcy proceedings in respect of Fin One, its debts being calculated as exceeding its assets by nine to four, or by fifty thousand million baht.

15. If, since June 25, 1997 (or at any rate *a fortiori* since July 25, 1997), Fin One was no longer in the position to resume or conduct its business operations as before, whatever right or entitlement LBSF may have against Fin One has become a right of imperfect obligation, contingent upon approval or sanction by the fiscal authorities of Thailand in accordance with its stringent mandatory policies as suggested by the International Monetary Fund and accepted by the Royal Government of Thailand to revive and resuscitate its otherwise ailing financial and fiscal health.

VI. Constitutionality of Administrative Decisions

16. That every sovereign State is entitled and empowered to adopt stringent administrative measures to control and restrain its finance companies in time of national emergency or financial distress, no one in this time and age could contest or contradict. That Thailand is today independent and sovereign, i.e., subject to no vestiges of fiscal limitation or extraterritorial imposition from without, is not here in dispute. At the material time, i.e., during the critical period of June 24 to July 29, 1997, the prevailing constitutional law was the Fifth Amendment to the Constitution of 1991. This is many respects represented a transitional period or cross-road for Thailand, tending to go the whole way in favour of constitutional democracy or democratic institutions under a liberal constitution (*see* Constitutions of the Countries of the World —Thailand, by Sompong Sucharitkul, release 96-2, issued March 1996, and release 98-2, issued March 1998, Oceana Publications Inc.).

17. The measures taken by the Thai government, through its competent fiscal authorities, namely the Ministry of Finance, the Bank of Thailand, and the appointed Finance Sector Restructuring Authority (FRA) were reasonable, lawful, nondiscriminatory and not in any way arbitrary. In point of fact, they conformed to the recommendations of competent international authorities, such as the International Monetary Fund and the World Bank.

18. Administrative decisions on the part of national fiscal authorities of Thailand are sanctioned by competent international organizations to which both Thailand and the USA are parties. There is no denial of administrative justice if the measures adopted by the Ministry of

Finance and the Bank of Thailand, as well as the FRA, do not discriminate against LBSF, nor are they arbitrary or in any way unjust or unreasonable, the avowed objective being to maintain and prevent further deterioration in the fiscal and financial stability of the national economy of Thailand.

19. As was generally known, the Royal Thai Government had sought to intervene to sustain the par value of the Thai currency, the Baht vis-à-vis the US$ at a rate of 25 Baht to 1 US$, and rightly or wrongly virtually exhausted its dollar reserve to defend the Baht unsuccessfully. The world market eventually prevailed and Thailand was obliged to allow the Baht to float. By June 25, 1997 the rate had fallen to 35 and 37 Baht, and by the end of the year to 47 Baht. The lowest devaluation of the Baht was reached in February 1998 at the rate of 59 Baht, before it recovered and stabilized, since 1998 until today, at an average of 43 Baht (fluctuating between 41 and 45 Baht).

VII. Maintenance and Reconciliation of Two Competing Policies

20. Thailand was fully justified and supported by the international community in its sustained effort to improve its ailing financial situation and monetary stability by adopting stringent measures affecting its citizens, as well as, foreign companies and enterprises without discrimination. Nevertheless, Thailand was consistently under the treaty obligation it owes to the United States in accordance with the bilateral Treaty of Amity and Economic Relations of 1966. Under the provisions of this Treaty, which is still in force between Thailand and the United States since its ratification in 1968, U.S.

and Thai nationals and companies operating in the territory of the other party "shall be accorded fair and equitable treatment" in regard to their property and enterprises. No unreasonable or discriminatory measures can be adopted by either party that would impair their legally acquired rights, and the parties shall assume that their lawful contractual rights are afforded effective means of enforcement in conformity with the applicable laws.

21. Thus, U.S. companies and nationals in Thailand are accorded most-favoured-nation treatment as well as national treatment in respect of their investments and business operations (see Articles II and III(1)). The provision of Article VII(1)(a) is understood not to preclude restrictions on the making of payments, remittances or transfers of funds to the extent necessary to ensure the financial stability and economic development of the country. For these reasons, both policies were followed by Thailand and a proper balance appeared to have been struck and maintained between the need of a contracting party to ensure economic viability and financial stability of its national development on the one hand, and the obligation to protect private investments in the host country by nationals and enterprises of the other contracting party, on the other.

VIII. The Applicable Laws of Thailand

22. Both expert witnesses appear to have agreed on the general principles of Thai civil law as contained in sections 5 and 6 of the Civil and Commercial Code, requiring good faith in the performance of binding obligations, and upholding the presumption of good faith.

Thus the Latin maxim: *omnia rite esse acta praesumuntur*, is the rule, unless the contrary if proved.

23. The right to set-off is recognized under section 341 for debts or obligations that are valid, binding and enforceable, equally mature and in equal proportion. A *bona fide purchaser for value without notice* will be protected under Thai law. The question to be examined is whether, in its attempt to set-off the pre-existing US$9.7 million with the 12 non-mature Bills of Exchange, LBSF is a bona fide purchaser for value without notice in the exercise of its extra-contractual right recognized in an appreciable measure by the Civil and Commercial Code of Thailand.

24. Granted that *bona fides* or good faith is presumed, and LBSF is entitled to that presumption, the next requirement to satisfy is whether LB SF is a *purchaser for value*. This is not transparent as no transfer of payment for the purchase or acquisition of the 12 Bills of Exchange from Lehman (Bangkok), its subsidiary, actually took place, except by way of a fax requesting endorsement by the Bangkok Bank followed by an indication in the company's ledger. Another element that seems dubious is whether LBSF is a purchaser for value *without notice*, in view of the fact that the 12 Bills of Exchange were not honoured when presented for redemption. Furthermore, LBSF itself filed a complaint before the Thai Police Department, constituting notification required by section 962 of the Civil and Commercial Code.

IX. Possible Solutions

25. In the application of relevant Thai laws to the case under examination, common law courts generally treat

questions of foreign laws as questions of facts to be proved by expert witnesses. In the case under review, the expert witnesses appear to have given conflicting or contradictory evidences regarding legal provisions and their applications. The Special Master, appointed by the Court, begs to submit another approach often adopted by international judicial instances, such as international arbitration or the International Court of Justice, when called upon to apply national law of one of the parties to the dispute, could apply the law of that State as if the Court were to sit in judgment as a national court on site.

26. With the greatest respect, it is submitted that the Honorable District Court in the case under review would be able to apply applicable Thai law *qua* law with all the judicial discretion pertaining to Thai Justices *in simile casu*. On the facts as admitted by the parties, LBSF could be deemed to have a right to set-off which is not unqualified. Assuming its debts to Fin One to be in the approximate amount of US $9.7 million, a Thai court could exercise its judicial discretion in an equitable manner. While according LBSF the most favoured-nation treatment, as well as national treatment, in terms of protection of the right to redeem the 12 Bills of Exchange that were not yet mature and not easy to evaluate. It would be for the Trial Judge to assess the residual value or the market value of the 12 Bills of Exchange in question for purposes of set-off.

27. In so doing, the assessing Judge might treat LBSF as being of the same rank in priority as other creditors of Fin One in the Bankruptcy proceeding or in the liquidation of its assets and liabilities or in the process of its winding up, the receiver or liquidator, as the case may be, having been duly appointed.

28. In the absence of evidence to establish the existence or pre-existence of other better secured creditors, it is possible to calculate the likely ratio of receivables for the 12 Bills of Exchange in accordance with Fin One's bankruptcy case petition (see Defendant Reply Affidavits Bundle of May 14, 2002, exhibit 3). According to the liquidator, Fin One's assets and liabilities are approximately 40 billion baht and 90 billion baht respectively, or a ratio of 4/9 or 44.4%. Applying this percentage to the face value of the 12 Bills of Exchange less any reductions due to immaturity would yield a realizable value of US$4.30 million, which could be amount of the possible set-off from the US$9.7 million LBSF owed to Fin One. Thereby, US$5.4 million would still remain owing to the liquidator or receiver of Fin One in order not to prejudice other creditors of Fin One. LBSF would then save US$4.30 million of its otherwise worthless Bills of Exchange from being completely written off.

29. Another alternative is to reduce the value of the 12 Bills of Exchange in the proportion of the average exchange rates taking into account the relevant date, i.e. July 27, 1997 and the prevailing Baht-US$ market rate as recorded by the International Monetary Fund. Hypothetically, the set-off amount could be 25/45 of the US$9.7 million which would amount to US$5.38 million, thus leaving the amount owing at US$4.32 million.

30. Since the two methods of calculation appear to yield relatively close or approximate results, the Special Master is persuaded that whatever solution is preferred, justice would be better served than either of the two extremes, i.e., assessing no value to the otherwise virtually valueless 12 Bills of Exchange or giving one-hundred percent full value of US$9.7 million as originally

calculated by LBSF regardless of the disabilities of Fin One, which has ceased operation.

X. Conclusion

31. Should the Court decide to adopt either of the two solutions proposed, it could be said that the applicability of relevant Thai laws is fairly executed, preserving the acquired rights of LBSF in the approximate and just proportion having regard to the equal opportunities and pro rata entitlements of other creditors, Thai as well as non-Thai, who were doing business in Thailand at the time. These solutions would not offend any mandatory policy of the forum state, i.e., Thailand, the District Court, as such, is presumed to be sitting in Thailand as a Thai civil court.

Dated: San Francisco, California
January 17, 2003

Respectfully submitted,

SOMPONG SUCHARITKUL

Sompong Sucharitkul, D.C.L.
Special Master to the Court

Golden Gate University School of Law
536 Mission Street
San Francisco, CA 94105

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FINANCE ONE PUBLIC COMPANY LIMITED,

Plaintiff,

—against—

LEHMAN BROTHERS SPECIAL FINANCING INC.,

Defendant.

SUPPLEMENTAL REPORT OF
SPECIAL MASTER TO THE COURT,
PROFESSOR SOMPONG SUCHARITKUL, D.C.L.

I. INTRODUCTION

1. This Supplemental Report is submitted to Honorable Justice Constance Baker Motley, United States District Judge, in response to the Justice's request for further clarification, and precision on some of the questions relating to the original Report as revised and amended on January 17, 2003.

2. To be of further assistance to the Court in regard to both access to the relevant texts as well as fluency in Thai, the language in which the applicable provisions of the law of Thailand are written, the Special Master will undertake additional efforts, not as much by way of giving a detailed account of the legislative history of the texts in question, but rather to provide a brief explana-

tory note on the general principles of Thai civil and commercial law as incorporated in the Civil and Commercial Code of the Kingdom of 1925.

3. It is to be noted in the first place that the draft Code has been prepared in several parts (or books or volumes) by a committee of experts from Thailand as well as from other countries and continents e.g., Asian (Japan), European, (United Kingdom, France, Italy), the Western Hemisphere (USA, Brazil, Argentina), under the supervision of H.R.H. Prince Rajburi Direkrit (Rabibhandhana) and Chao Phraya Abairaja (Gustav Rolin Jacquemijns, Chief Minister from Belgium.) The legal principles are drawn from Thai legal traditions or customs, reformulated in civil-law codified format, except for the laws of evidence and procedural laws that are more derivative of common law practices.

4. Not unlike the American school of jurisprudence (Realism) associated with Justice Oliver Wendell Holmes and Dean Roscoe Pound, Thai law cannot be divorced in its interpretation and application from Thai Courts, nor from Thai Judges. The law as black letter law is not in itself so meaningful as when actually given interpretation and application by the Trial Judge. This is due in no small measure to the inter-temporal character of Thai law which is a living body of rules, a *corpus juris*, that is alive, not frozen, not moribund, but vivacious, growing and progressively developing, not imprisoned, as it were, in its original cast or mold.

5. Unlike common-law systems, however, the legal system of Thailand does not recognizes the doctrine of precedent to the extent practiced in the United States, in the United Kingdom or in other common-law jurisdictions. The practice of citing judicial decisions is confined to the citation of Dikas, i.e., final decisions of the

Supreme DIKA Court (Court of final appeal not dissimilar from the United States Supreme Court, or the House of Lords in the United Kingdom, but different from the French *Cour de Cassation*). Even the decisions of the Supreme Dika Court of Thailand are not regarded as "precedents" with absolutely binding authority, but only highly persuasive for itself in subsequent cases and most likely will be followed by the Courts of Appeal and lower Courts until overturned by a new set of decisions by the Supreme Dika Courts.

6. That is partly the reason for a marked absence of frequent citations of leading decisions, not only because of their paucity but also because of the marginal utility of their references.

7. As for the hierarchy of norms, the law, written or unwritten, codified or enacted, by the house of Representatives or Royal Decrees or Ministerial Regulations, regardless of their sources apart from the written constitution and the decisions of the Constitutional Court, will be construed in accordance with a venerable canon of constructions. Section 4 of the Civil and Commercial Code (hereinafter CCC), Book I : General Principles Miscellaneous Provisions, provides

> *"The application of any law shall conform to the literal meaning of the written text of the legal provisions, having regard to the intent and purposes of those provisions.*
>
> *"Where there is no written law or legal prevision that can be applied to the case under review, local traditions and usages shall govern the case. In the absence of such local traditions and usages, the closest analogous legal provisions shall be applied.*

Where no such legal provisions can be found general principles of law shall apply."

8. This wide variety of sources of Thai law and its rules of construction allow the parties to the dispute to submit diametrically opposing views as reflected in Your Honor's subsidiary request. The Court was left "with a quandary whom to believe?" : Judge Suchart Sooksumitr, expert on Thai law for the plaintiff, and Professor Sahaton Rattanapijit. The more accurate view is likely to be somewhere between the two.

9. The Special Master is obliged to respond to the Court's requests in both alternatives.

II. RESPONSES TO THE COURTS REQUESTS

10. The following questions may now be considered

A. *Whether. . . Lehman Brothers Special Financing Inc. is a* boda fide *purchaser for value without notice?*

A closer examination of this question reveals three separate elements that need investigation, so that the more accurate answer to the question in its entity need not be YES or NO, but could also be YES and NO, or YES BUT or NO BUT.

11. (a) GOOD FAITH : Good faith is required by Section 5 of the CCC "In the exercise of any right by the person or in the discharge of any obligation, each person shall act in good faith." The presumption of "good faith" is provided by Section 6. But this presumption of "good faith" in every act is only a presumption of fact, and like all other presumptions of fact, it is rebuttable by credible evidence to the contrary.

12. On this point, the Special Master is of the opinion that the wish of Lehman Brothers Special Financing Inc. or the defendant to prevent further losses that it might and would incur by attempting to redeem the bills of exchange at a critical moment before their maturity dates in order to be in a position to exercise "to the maximum extent possible" its set-off right, if any, is a legitimate concern and not inconsistent with the Thai concept of "good faith". There was no evidence to show that the purpose of the exercise was to take undue advantage, less to defraud other possible creditors. The conduct of Lehman Brothers in so doing, in the considered opinion of the Special Master, is neither out of order, nor contradictory to the practice of a prudent or diligent business management.

13. But under Thai law or any law, for that matter, absence of "good faith", even proven by the Plaintiff, would not necessarily imply "bad faith". An act without *bona fides* does not mean that the act is performed with *mala fides* While "bad faith" or *mala fides*, even if constituted, is still to be distinguished from fraud or *fraus* or *dolus malus* which would vitiate all transactions or *fraus omnia vitiat.*

14. This series of reasonings leads to the conclusion that the Defendant, Lehman Brothers Special Financing Inc., hereinafter LBSF, is clearly *a bona fide* purchaser.

15. (b) PURCHASER FOR VALUE : The phrase "purchaser for value" in Thai law, as in other laws, refers to "true value", "market value" or payment of a real price. In the circumstances, the acquisition of the Bills of Exchange by Lehman Brothers through its office in Hong Kong by a method of internal transfer would appear to lack transparency as to the actual price or "pricing process". In another area of corporate transac-

tions within the same group or with a subsidiary or branch office, "transfer pricing" has given rise to some problems in corporate tax for income tax assessment purposes. This absence of transparent visibility appears to have obscured the method of evaluation of the actual amount of the payment transferred. In the Special Master's considered opinion, LBSF is not a clear-cut "purchaser for value". Its qualification is impaired by the lack of clarity or openness in its method of "pricing".

16. (c) WITHOUT NOTICE : In Thai law, the temporal dimension or the timing or the question of time is very relevant and can be conclusive or determinative of the failure or success in an attempt to apply the test of "knowledge" or "notice" or "absence" or "imputation" thereof. The circumstances of the case reveal different moments that are critical. Clearly, at the beginning, the original acquisition of the Bills of Exchange by Lehman (Thailand) satisfied all the three requirements. Lehman (Thailand) was *ab initio* a purchaser "for value", perhaps subsequently acquisition by LBSF was less so on account of "transfer pricing", and *ab initio* by Lehman (Thailand) was also without notice of any irregularities. However, at the subsequent critical date of attempted redemption by LBSF, not only did LBSF have some inkling of the uncertain or even precarious status of Finance One, but LBSF itself notified the police. The Party that undertook to give notice of "unpayment" or "insolvency" or "incapacity to honor the Bills of Exchange, can hardly be heard to assert that it is since that date without knowledge or notice of the defect, of which it took the trouble to complain to the Police. The Special Master is therefore of the view that although the Defendant was at the beginning "without notice," it could not be stated with absolute assurance that it is "all

the time without notice," nor "at the material time without notice."

17. B. *How far is LBSF protected under Thai Law?*

This question could be rephrased in the context of the set-off right under the CCC Book II "Obligations", Title 5 : Termination of Obligations, Part 3 : Set-off whether LBSF is entitled to exercise extra-contractual set-off rights against Finance One, and if so, "How far could LBSF unilaterally and independently determine the value of the 12 unredeemed Bills of Exchange in the exercise of its set-off right against Finance One?"

18. If under A., the answer is partly in the affirmative, the answer still does not dispose of the problem of the extent of protection of the LBSF under Thai law which is also regulated by the Bilateral Treaty of 1966 with the United States. Similarly, Under B., an affirmative confirmation of LBSF extra contractual set-off right against Finance One as verified by the Special Master is still inconclusive of the quantum or valuation of the 12 Bills of Exchange to be set off against Finance One.

19. As questions from the two areas, namely, the set-off right of LBSF and its entitlement to legal protection under Thai law, according to the Special Master, are answered both in the affrmative, upon preponderance of the evidence submitted, affirmations are yet inconclusive as to the extent of the exact amount.

20. An analytical examination of Section 341 of the CCC reveals the same results for set-off right as for the status of LBSF as a "*bona fide* purchaser for value without notice." Section 341 in effect reads :

> *"If two persons are mutually bound by legal obligations arising out of the same subject-matter and*

if both obligations or debts are equally due for payment, either of the debtors could set-off its debts against the other in the amount and in as far as the obligations are conterminous and arising out of the same subject-matter, unless the nature of the obligation of one party does not permit such a set-off.

"The provisions of the preceding paragraph do not apply contrary to the declared intentions of the parties. This declaration of intentions cannot be invoked to impair the rights of a bona fide third party."

21. The Special Master reads this Section as permission of set-off rights of LBSF in the absence of any declared intention of the parties, disallowing set-off. But the final calculation of the amount to be assessed or evaluated in the set-off remains to be examined.

22. It is at this point that judicial discretion is recommended by the Special Master, having regard to all the material facts and relevant circumstances of the case. Two possible methodologies commend themselves, as earlier suggested, in the assessment or calculation of the amount of obligation, or debt to be set-off, the parties being the same in both sets of obligations while the status of Finance One was undergoing transformation, not unknown to LBSF.

23. In the calculation or quantification of the amount that one party to the dispute is permitted to set-off against the other, the trial judge in Thailand, as in other civil law jurisdictions, is *sovereign*, independent of, and unassisted by any jury or assessors. In the case before this Court, the applicable law is further modified by *lex specialis* relating to the capacity of Finance One to continue operation only under the control and supervision of

the Ministry of Finance and the Bank of Thailand. There is an imperative need to distribute the assets of Finance One in the event of insolvency. It was apparent that Finance One's creditors would not be paid in full. The mandatory policy of the Forum State (Thailand) governs the interpretation and application of Thai law in regard to the extinction or discharge of obligations of Finance One. LBSF was not entitled to any preferences over and above any other creditors of Finance One who would receive equal protection under Thai law.

24. The first possible criterion for the Court to apply would be one of proportionality or *pro-rata* evaluation of the Bills of Exchange, taking into account the assets and liabilities of Finance One as a whole. If the ratio was 4 to 9. or 4 out of 9. LBSF would receive 4 out of 9 or 4.4% of what would otherwise be owing by Finance One to LB SF. Thai law has not embraced the common-law concept of equity, but proportionality is not essentially different from equality among the creditors of the same rank, same priority, same preferences, entitled to the same protection, without discrimination or arbitrary allocation. In the common law, equality is equity. In Thai law, the application of a legal principle must not deviate from the notion of public order or good morals of the Thai people. This criterion would result in the amount *of* set-off being fixed at US$ 4.3 million and repayment by LBSF to the liquidator or receiver of Finance One at US$ 5.4 million.

25. The second possible criterion would be the exchange rate and/or par value of the Bills of Exchange at the time of attempted redemption or failure to honor. This methodology will not yield a readily determinable amount, since it fluctuates with the rate of exchange between Thai Baht against US dollar or vice versa,

between the date of the judgment and that date of the attempted redemption. If it was 25 Baht then and 45 Baht to the US dollar now, the ratio could be 25/45, but this would have to be assessed on the basis of the actual market value of the Bills of Exchange with different dates of maturity and possible varying market values as eventually they may have lost most of their original value and become worthless.

26. The first solution is authorized by Thai law and could be adopted by the US Court applying Thai law. The second solution is indeterminate. The two extremes are not recommended in any event. The 12 Bills of Exchange cannot be given their full face value for set-off purposes. On the other hand, to give no value at all to the 12 Bills of Exchange would be to deny LBSF legal protection afforded by Thai law equal to that guaranteed to all other creditors. No preferences or secured creditors were contemplated in the case under review for present purposes. Thus equality among the creditors of Finance One is recommended.

27. One last thought that lingers in the mind of the Special Master is the judicial discretion normally exercised by Thai Courts and the US standards that this Court might equally apply permissively in conformity with Thai law. A Thai Judge would determine in case of doubt that both parties share the same risk and the same loss, in a fifty-fifty share or half and half.

28. As to Your Honor's last question : "Is it impossible to say whether LBSF is a purchaser for value without notice under Thai law?", without in any way being evasive, the Special Master finds that he could not go beyond the limits set by Thai law, while nothing is impossible, he could not say what the law did not say. In his study, he has made extensive research in Thailand

and has had access to opinions of the highest judicial authority, a former President of the Supreme Dika Court, currently a Senior Judge of the Central Civil Court and a former Legal Advisor of the Bank of Thailand, currently an Executive Vice-President of the Bangkok Bank in charge of Legal Affairs.

29. It is the Special Master's hope that he has responded more fully to each and every question raised, with a greater or lesser degree of clarity and precision that reflects the position closest to the nature and substance of the relevant applicable rules of Thai law. He begs the Court's pardon for not being able to answer "YES" more fully when an unequivocal affirmative response is not warranted. "Absoluteness" or "Definiteness" in relation to some of the combined or collective questions raised would be inexact and slightly derogate from the rules of law which are otherwise not unqualified in their application.

30. The Special Master remains seized of the matter and will respond to further queries, should the Court so desire.

San Francisco, April 4, 2003

Respectfully submitted,

SOMPONG SUCHARITKUL

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EXCERPTS FROM THE THAI CIVIL AND COMMERCIAL CODE

Section 5. Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith.

Section 6. Every person is presumed to be acting in good faith.

Section 341. If two persons are bound to each other by obligations whose subject is of the same kind and both of which are due, either debtor may be discharged from his obligation by set-off to the extent to which the amounts of the obligations correspond, unless the nature of one of the obligations does not admit of it.

The provisions of the foregoing paragraph do not apply, if the parties have declared a contrary intention; but such intention cannot be set up against a third person acting in good faith.

Section 344. A claim against which there is a defence may not be set off. Prescription does not exclude set-off, if the claim barred by prescription was not barred at the time at which it could have been set off against the other claim.

–Translation–

Order of the Ministry of Finance

No. 139/2540

Re. Order of Cessation of Business Operation of Finance One Public Company Limited

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In order to alleviate the problems surrounding the financial standing and operations of Finance One Public Company Limited, and so as to ensure the stability and well-being of the financial system as a whole, by the powers vested in Article 26 of the Royal Decree Governing the Operations of Finance, Securities, and Credit Foncier Companies of B.E. 2522, which was further amended by royal amendment via the Royal Decree Governing Finances, Securities. and Credit Foncier Companies of B.E. 2522 (2nd issue) of BE 2528, the Minister of Finance, on the recommendation of the Bank of Thailand, hereby informs Finance One Public Company Limited to cease operations either completely or in part as per the following:

Clause 1. To cease all operations for a period of 30 days starting from the date of this order, with the exception of those operations detailed under Clause 2).

Clause 2. To continue operations which will have direct benefit to the company or which may prevent damage from occuring to the company as follows:

(1) To follow up on debt collections or to take actions which will lead to

debt repayments or to allow customers to pledge or mortgage additional securities so as to fully cover the extent of their debts.

(2) To receive payments in full or in part from debtors or persons making payments in lieu of the debtors, without permitting the debtors to make any alterations to the original terms of payment.

(3) To make payments to government entities on required items such as taxes, fines, etc.

(4) To make payments for items considered part of normal operations, such as salaries, overtime, previously given benefits, electricity, water, and telephone fees, and other miscellaneous daily expenses.

(5) To release pledges or mortgages on collateral in cases where debts have been fully repaid on the condition that the Managing Director or other authorized persons documents that the debtor has no more/other outstanding debts due to the company, and the company receives prior approval from the Bank of Thailand or its designee.

(6) To offset debts from loans with promissory notes which were pledged either by the debtor or a guarantor. This offsetting must not

result in any payments being made by the company. In the event the pledged promissory notes are possessed by a director, one of the company's authorized management or a person/entity referred to under Article 20(7), paragraph 2, (his off-setting will not be permitted.

(7) To submit pleas or counter-claims as well as evidence to courts of law in the event legal actions are taken against the company.

(8) To take legal action or to make claims in civil or criminal cases which are due to expire soon, including appealing requests for reconsideration.

(9) To engage in other actions as permitted by the Minister of Finance or other persons authorized by the Minister of Finance.

Clause 3 To develop a plan in which the company may be acquired or transferred to another financial institution approved by the Bank of Thailand within 14 days of this order.

Clause 4 For the company to take the following actions:

(1) To immediately transfer all funds received from cash collections and bill payments into the company's account at the Bank of Thailand.

(2) To insure that the company's assets and interests are protected against damage or loss.

(3) To disallow the company, its directors, staff, company hirees, or other persons from transferring ownership, selling, distributing, relocating, concealing damaging, destroying, or making worthless, assets belonging to the company, including account ledgers, documents, company seals, and other evidence relating to the assets or liabilities of the company, whether in the possession of the company or not.

Clause 5 The Managing Director, persons authorized to act on behalf of the company, staff, and company hirees all have the duty and are strictly enjoined to safeguard the interests and assets of the company, which include account ledgers, documents, company seals, and other evidence relating to the assets or liabilities of the company.

On June 26, B.E. 2540

Signature

(Mr. Tanong Pittaya)
Minister of Finance

(Translation)

Order of Ministry of Finance

No. 158/2540

Re: Order of Cessation of Business Operation of Finance One Public Company Limited

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Reference is made to the Order of Ministry of Finance No. 139/2540, Re: Order of Cessation of Business Operation of Finance One Public Company Limited dated June 26, 1997, instructing Finance One Public Company Limited to cease its business operation either in whole or in part for a period of 30 days from the date of such order.

By virtue of Section 26 *quarter* of the Act on the Undertaking of Finance Business, Securities Business and Credit Foncier Business, B.E. 2522 as amended by the Emergency Decree Amending the Act on the Undertaking of Finance Business, Securities Business and Credit Foncier Business (No. 2) B.E. 2528, the Minister of Finance with the recommendation of the Bank of Thailand, hereby orders Finance One Public Company Limited to cease its business operation temporarily as from July 28, 1997 in order to rectify the condition or operation of Finance One Public Company Limited and to maintain the financial stability or financial institution system. Such order of cessation of business shall continue to be in effect unless and until Finance One Public Company Limited is able to complete the rectification in accordance with the governmental policy and the cessation of business shall be subject to the following rules and conditions:

Clause 1. During the period where Finance One Public Company Limited is in the process of implementing the rectification or rehabilitation plan for obtaining approval from the governmental authority either by way of its increase of capital, its merger or amalgamation with or transfer its business to other financial institution, Finance One Public Company Limited (the "Company") may perform the following acts and things:

A. Transactions in relation to or in connection with its lending of money or its debtors

(1) To follow-up any debt collections or to do any acts and things in order to obtain any debt repayments or any pledge or mortgage from its debtors, so that the collateral or security to be obtained could cover the debts.

(2) To accept any repayments of debts either in whole or in part from the debtors or any persons without any conditions; provided that the terms and conditions for the repayments may not be changed from those previously agreed upon.

(3) To release any pledges or mortgages upon the repayment of debt in full; provided that the Managing Director or any other authorized persons shall have to confirm and certify in writing that the relevant debtor has no other outstanding debts owed to the Company and provided further that such release of pledges or mortgages shall have been approved by the Bank of Thailand, any person authorized by the Bank of Thailand, or inspector of the Bank of Thailand.

(4) To extend the repayment period only in the event where the debtor is the debtor under promissory notes or discounted cheque agreement and such debtor wishes to have the Company extend the repayment period if such debtor has repaid all outstanding interest or parts of principal; provided that such extension may not be made in excess of the time prescribed in the promissory notes or discounted cheque agreement and in any event no such extension may be made for a period more than 6 months after the due date of such promissory notes or discounted cheque agreement.

(5) To set-off any debts lent by the Company against any debts borrowed by the Company by way of its issuance of promissory notes; provided that such setting-off may not be made in the event the holder of the promissory notes is a director of the Company, or any person who has the power to manage the Company, or any person or partnership specified in paragraph 2 of Section 20(7) of the above-mentioned Act and provided further that the setting-off shall not cause the Company to make any payment.

(6) To file an answer or counterclaim as well as to submit any evidence to the courts in the event that the Company is sued.

(7) To lodge a law suit or complaint in civil or criminal cases, including to appeal in an appellate court, or supreme court and to file an application for a new trial.

(8) To make any compromise with the debtor in the court; provided that a prior approval from the Bank of Thailand shall have to be obtained.

(9) To proceed with the following acts and things in respect of the lending money and some certain type of debtors:

(9.1) to release parts of the properties subject to pledge or mortgage in accordance with the amount of debts repaid by the debtors under real estate development project; provided that there shall have to be provisions clearly specified in the lending documents as to the amount of debts to be repaid and the amount or type of properties to be released from such pledge or mortgage and provided further that such release of pledge or mortgage shall have been approved by the Bank of Thailand, any person authorized by the Bank of Thailand, or inspector of the Bank of Thailand; or

(9.2) to transfer title to the cars to the debtors who have already paid all outstanding debts under the car hire-purchase in full.

B. Transactions in relation to or in connection with the lending of money or the debtors for securities trading

(10) To transfer any securities of its customers deposited with the Company to another member company of Thailand Security Depository

Company Limited according to the customers' order; provided that such customers shall have no debts owed to Finance One Public Company Limited.

(11) To do any acts and things in order for the Company to obtain the repayment of debt lent by the Company to its customers under the margin loan program, including to accept the selling order or to sell any securities and to deliver such securities to Thailand Security Depository Company Limited.

(12) To transfer any securities in the customer's account and the Company's account to the person who make the tender offer pursuant to the customer's order whereby the application to make the tender offer already been filed with the SEC; provided that the transfer of securities in the Company's account may be made only in the event that the offered price of such securities is not lower than the market price.

(13) To receive from the customers the subscription price of newly issued shares and to subscribe for those shares as well as to make payment therefor; provided that such making of payment shall have been approved by the Bank of Thailand, any person authorized by the Bank of Thailand, or inspector of the Bank of Thailand.

(14) To use the promissory note, which is used as security for borrowing of the money to purchase securities, to set off against the debt balance of the money lent for purchase of

securities. This procedure must follow the Civil and Commercial Code, but the Company must not pay for the difference after such set-off.

C. Transaction in relation to or in connection with the investment in securities.

(15) To sell securities as the Company deems necessary; provided that the selling price shall have to be higher than the average cost of such securities.

(16) To invest in bonds traded in the repurchase market of the Bank of Thailand.

(17) To invest in liquid assets categorized in Section 28 of the Act on the Undertaking of Finance Business, Securities Business and Credit Foncier Business B.E. 2522.

D. Other transaction

(18) To sell any assets pending for sale by way of public auction.

(19) To engage in the business of being a financial advisor according to the existing agreement.

(20) To perform the following acts under the name of provident fund:

(20.1) To receive any payment made to the provident fund.

(20.2) To make payment to the member whose status of being member is terminated.

(20.3) To perform any other acts other than the receiving and making payment of

money; such as, making amendment to the articles or making change to the directors of the providence fund.

(21) To make any payments required by governmental body; such as taxes, fines, etc.

(22) To make any payments necessary and routine on its normal course of business, i.e. payment as to salaries, overtime pay, benefits given to its employees, including electricity, water, and telephone fees, and other miscellaneous daily expenses.

(23) To perform any other acts where approval from the Bank of Thailand has been granted.

Clause 2. The Company shall:

(1) not make any repayment under the promissory notes, bills of exchange and certificate of deposit, but the Company may extend the time of repayment period thereunder in accordance with the regulations prescribed by the Bank of Thailand;

(2) immediately transfer or deliver all sums received from cash collections and repayments to the Company's account at the Bank of Thailand;

(3) ensure that all of the Company's assets and interests are fully protected;

(4) not transfer, sell, dispose of, relocate, conceal, take away, make any damage to, destroy, do any things that may depreciate or devalue any of its assets, including all books and records and any other evidences of its assets and liabilities whether any of such assets, books, records, and evidences are in the possession of the Company or not, and not allow any of its directors, officers, employees, or any other persons to do so.

Clause 3. It shall be the obligations and duties of the managing director, manager, officers, employees or any responsible persons of the Company to protect all of the Company's assets and interest, including any of the Company's accounts, records, seal, documents, and any other evidences of such assets or liabilities of the Company.

Clause 4. The Company and any related persons shall have to facilitate and co-ordinate with any competent officer, inspector of the Bank of Thailand and any other persons assigned by the committee of merger or transfer of business of financial institutions.

On June 25,1997

Signature

(Mr. Tanong Pittaya)
Minister of Finance

–Translation–

Garuda Emblem

Judgement
Certified Document Fee
20 Baht Invoice
Book No. 7085/2542 No. 78
Dated June 14, 1999 (B.E. 2542)
–Signature–
Deputy Registrar of Civil Court of Southern Bangkok

Black Case No. 6558/2541
Red Case No. 12193/2542

In the name of the King

The Civil Court of Southern Bangkok

On the 17th Day of May, 1999 (B.E. 2542)

Civil Case

Huaykaew Real Estate Company Limited

plaintiff

versus

CMIC Finance and Securities Public Company Limited

defendant

Subject : a setoff

The plaintiff charged that the plaintiff is a juristic person according to law under the kind of a limited company and had authorized Mr. Jareonporn Kasinanont to enter an action and to act on its behalf. The defendant was a juristic person according to law under the kind of a public limited company. On March 3, 1995 (B.E.

2538), the plaintiff entered into a loan agreement with Tisco Finance and Securities Public Company Limited and the defendant. On June 20, 1996 (B.E. 2539) the plaintiff made an memorandum of agreement for the first amendment to the loan agreement. According to the contract and under the said memorandum of agreement, the plaintiff borrowed money in the amount of 750,000,000 Baht from Tisco Finance and Securities Public Company Limited and the defendant in a ratio of 70: 30 respectively. Tisco Finance and Securities Public Company Limited was a loan manager and had authority to keep the originals of contracts related to debts and the collateral placed by the plaintiff. In entering into this loan agreement, Makkasan Real Estate Company Limited acted as a guarantor and on March 14, 1995 (B.E. 2538), the plaintiff mortgaged 62 plots of land to Tisco Finance and Securities Public Company Limited and the defendant as a security for the loan repayment. On February 15, 1996 (B.E. 2539) the plaintiff requested to combine and divide some part of collateralized land, making it become 55 plots of mortgaged land. On February 22, 1996 (B.E. 2539), the plaintiff redeemed some plots of mortgaged land, leaving the balance to be 11 plots. On March 10, 1997 (B.E. 2540), the plaintiff additionally mortgaged one plot of land, giving the number of mortgaged land to be 12 plots while the number of land that had already been redeemed was 43 plots. In this regard, the plaintiff delivered land title deeds to Tisco Finance and Securities Public Company Limited to be held as collateral in place of a mortgage. In redeeming the said mortgaged land, the plaintiff issued a check to the defendant to be held as collateral in lieu of a mortgage and issued a new check as a replacement of the previous one drawn in cash in the amount corresponding to total debt the plaintiff made repayment to defendant on several

occasions. On November 5, 1997 (B.E. 2540), the plaintiff issued a check of Thai Danu Bank Public Company Limited grand, Grand Ammarin Branch, No. 8098052 dated December 25, 1997 (B.E. 2540) for the amount of 57,866,463.12 Baht. Subsequently, on January 2, 1997 (B.E. 2540) the plaintiff made repayment of the loan to the defendant in the amount of 3,931,875 Baht and issued a check of Thai Danu Bank Public Company Limited, Grand Ammarin Branch, No. 8102865 dated January 15, 1998 (B.E. 2541) for the amount of 54,934,588.12 Baht to the defendant to be held in lieu of check No. 8098052 which was to be returned to the plaintiff by the defendant. However, the defendant refused to return it by making an excuse that it had not yet been found. During June 6, 1996 (B.E. 2539) through June 11, 1997 (B.E. 2540), the plaintiff was able to sell the land and thus requested its title deeds from Tisco Finance and Securities Public Company Limited with the approval of the defendant for a transfer to the plaintiffs customers in a quantity of 12 plots, thus making the number of plots of already redeemed the mortgage and land with their land title deeds held by Tisco Finance and Securities Public Company Limited at present to be 31 plots. In such financing, the plaintiff borrowed loan from the defendant for the amount of 170,997,572.09 Baht and kept on making repayment of principal and interest continually. On December 2, 1997 (B.E. 2540), the plaintiff had an outstanding debt of 116,132,160.21 Baht. The plaintiff issued two promissory notes to the defendant, namely No. 013/2540 for the amount of 21,000,000 Baht by issuing in accordance with the total loan debt to be used as outstanding working capital and No. 016/2540 for the amount of 95,132,160.21 Baht by issuing in accordance with the total loan debt to be used as expenditures for the overdue payment in constructing

houses and condominiums. In this regard, the plaintiff issued a promissory note to the defendant an each draw-down of the loan amount and whenever an interest rate had been adjusted or some portion of loan had been repaid, the plaintiff would issue a new promissory note to the defendant to be held as a replacement of the previous one and the defendant would return the previous promissory note to the plaintiff on each occasion. However, there were six promissory notes that had not been returned by the defendant namely No. 001/2538, No. 002/2538, No. 003/2539, No. 006/2540, No. 007/2540 and No. 015/2540 with an excuse that they had not been found. On August 28, 1996 (B.E. 2539), the defendant issued a prospectus offering for debenture sale with redemption falling due in. 2001 (B.E. 2544). On December 17, 1997 (B.E. 2540), the plaintiff bought the defendant's debentures from its existing debenture holders for a number of 116,000 units, being the value of 116,000,000 Baht. The plaintiff was then in a position of the defendant's creditor after having notified the defendant's registrar and the debenture registrar already issued a debenture certificate to the plaintiff. On March 2, 1997 (B.E. 2540), the defendant made the first payment of debenture interest to debenture holders in accordance with the terms and conditions in the defendant's prospectus for debenture sales. However, on September 2, 1997 (B.E. 2540), which was a due date for making the second payment of debenture interest, the defendant failed to make payment of debenture interest to its debenture holders and therefore the defendant had been in default of payment from the said date. On November 14, 1997 (B.E. 2540), the meeting of the defendant's debenture holders passed a resolution to amend the terms and conditions of the debentures by specifying the defendant to be in default and the debenture holders

were entitled to enforce the payment of the debenture principal and interest-without the need to pass a resolution of the debenture holders' meeting if the defendant turned to be in default of paying the debt to any creditors. Therefore, it was deemed that the defendant was in default under the terms and conditions of the debentures, the plaintiff was entitted to demand the payment of principal and interest from the defendant forthwith. In addition, on June 26, 1997 (B.E. 2540), the Minister of Finance issue an order to suspend the defendant's operations temporarily and ordered the defendant to propose a rehabilitation plan to restore its standings and operations and submit it to the Board of the Financial Sector Restructuring Authority (FRA) for approval. On December 8, 1997 (B.E. 2540), the FRA concluded that the defendant's rehabilitation plan did not pass its consideration criteria and the defendant was no longer be able to rehabilitate its status and operations. The FRA issued an order appointing a new board of directors to proceed with the liquidation of the defendant's company and thus it was deemed that the defendant had ceased discontinued its business operations wherein the defendant was in default under the terms of the defendant's prospectus for debenture sales. Accordingly, the plaintiff was entitled to demand the defendant to make payment of principal and interest forthwith calculated at an annual interest rate of 11.40 percent from March 2, 1997 (B.E. 2540) to December 17, 1997 (B.E. 2540) in the amount of 10,470,509.59 Baht, making the total amount of principal and interest to be 126,470,509.59 Baht. On December 2, 1997 (B.E. 2540), the defendant issued a letter dated December 1, 1997 (B.E. 2540), demanding the plaintiff to make repayment of principal and interest under the loan agreement. On December 18, 1997 (B.E. 2540), the plaintiff sent a letter to the defendant for a

setoff between the debentures in which the plaintiff was the defendant's creditor and the debt under the loan agreement in which the defendant was the plaintiffs creditor. This resulted in a setoff between the plaintiffs debt and the defendant's debt on December 17, 1997 (B.E. 2540). On the said date, the plaintiff was the defendant's creditor over the debentures, covering the principal and interest amount of 126,270,509.59 Baht whereas the defendant was the plaintiffs creditor under the loan agreement, covering the principal and interest amount of 117,050,429.69 Baht. After the setoff, the defendant was still indebted to the plaintiff at the amount of 9,420,079.90 Baht. On February 3, 1998 (B.E. 2541), the plaintiff sent a letter to the defendant confirming the setoff and requested the defendant to register the redemption of mortgaged land and deliver promissory notes, checks, material documents as well as other properties or relevant documents related to its obligation under the loan agreement to the plaintiff within 5 days. However, the defendant neglected to do so. In this regard, the court is requested to enforce the defendant to make payment of 9.714,269.09 Baht to the plaintiff plus interest at an annual rate of 11.40 percent of the principal amount of 9,420,079.90 Baht as from the date of the plaint entry until payment is made in full and order the defendant to record cancellation and deliver the check or Thai Dante Bank Public Company Limited, Grand Ammarin Branch, No. 8098052 dated December 26, 1997 (B.E. 2540) and No. 8102865 dated January 15, 1998 (B.E. 2541) as well as to record cancellation and deliver promissory notes No. 001/2538 dated March 17, 1995 (B.E. 2538), No. 002/2538 dated March 21, 1995 (B.E. 2538), No. 023/2539 dated December 2, 1996 (B.E. 2539), No. 006/2540 dated June 12, 1997 (B.E. 2540), No. 007/2540 dated June 12, 1997 (B.E. 2540),

No. 013/2540 dated September 6, 1997 (B.E. 2540), No. 015/2540 dated November 12, 1997 (B.E. 2540) and No. 016/2540 dated November 12, 1997 (B.E. 2540) to the plaintiff and order the defendant to register the redemption of mortgaged land title deeds No. 533, 481, 9646, 11237, 15328, 15329, 15330, 77239, 77240, 77264, 77265 and 77266 at Tambon Samsen Nai (South Bang Sue), Amphur Phayathai (Bang Sue), Bangkok Metropolis on the part of land mortgaged by the plaintiff to the defendant. In addition, the court is requested to order the defendant to make a notification to Tisco Finance and Securities Public Company Limited, instructing not to seize land title deeds No. 532, 534, 535, 536, 537, 538, 540-556, 561, 563, 565, 566, 568, 572, 574 and 575 at Tambon Samsen Nai (South Bang Sue), Amphur Phayathai (Bang Sue), Bangkok Metropolis on behalf of the defendant and order the defendant to deliver the guarantee contract for all kinds of debt dated March 6, 1995 (B.E. 2538) in which Makkasan Real Estate Company Limited is a guarantor for the plaintiff to the plaintiff or Makkasan Real Estate Company Limited and order the defendant to notify Tisco Finance and guarantee Public Company Limited and Makkasan Real Estate Company Limited that the obligation under the guarantee contract of Makkasan Real Estate Company Limited dated March 6, 1995 (B.E. 2538) has been extinguished. If the defendant did not follow, it shall be deemed that the court's judgment is taken to deliberate the defendant's intent.

The defendant testified that the plaintiff had not duly authorized Mr. Jareonporn Kasinanont to enter an action. The defendant was unable to effect the performance of the obligations or a setoff to the plaintiff because it had to comply with the order of the Bank of Thailand and the Committee to Supervise the Merger and Transfer Business of Financial Institution. The plaintiff was required

to claim the debt amount from the Financial Sector Restructuring Authority (FRA) by applying for the distribution of average debt in accordance with the criteria of the FRA. The total debt amount alleged by the plaintiff to be the amount of debt in which the defendant was the plaintiff's creditor was incorrect. The plaintiff was the defendant's debenture holder in bad faith so that it was not entitled to take the debentures for a setoff against the debt in which the plaintiff was liable to the defendant. The court was requested to order the dismissal of the case.

In the settlement of issues, there are issues in dispute to be considered in the case as follows:

1. Whether or not the plaintiff had duly authorized Mr. Jareonporn Kosinanont to act on its behalf?

2. Whether the defendant was entitled lawfully not to effect performance of obligation or a setoff to the plaintiff?

3. To what extent that the defendant was liable as a debtor and a creditor in the charge?

4. Whether the plaintiff was entitled to take the debentures for a setoff against the defendant?

Issue 1 and issue 3 are questions of fact. As the plaintiff is the alleging party and the defendant is the refusing party, the burden of proof shall be borne by the plaintiff. Issue 2 and issue 4 have been alleged by the defendant, so the burden of proof shall be borne by the defendant. Due to the essential nature of issue 2 and issue 4, the defendant has the duty in adducing the evidence pertaining to all issues. Thereafter, the plaintiff shall adduce counter evidence.

In the course of trial, the defendants proved that the defendant was a juristic person according to law under

the kind of a public limited company with Captain Charnchai Charnchaisuke, being Chairman of the board having the authority to sign on behalf of the defendant as shown in a copy of the certificate, Exhibit Lor. 1, having the objectives to undertake finance businesses as shown in the lieense of the Ministry of Finance, Exhibits Lor. 2 and Lor. 3. On June 26, 1997 (B.E. 2540), the Ministry of Finance issue an order to close down problem-ridden financial institutions including the defendant and order the submission of a rehabilitation plan to the Ministry of Finance. During that period, the defendant was allowed to transact only those activities specified by the Bank of Thailand and the Committee to Supervise the Merger and Transfer Business of thē Financial Institutions as shown in a copy of the order of the Ministry of Finance No. 138/2540. Exhibit Lor. 4. In this regard, the defendant had submitted its rehabilitation plan but did not receive the approval. Later, on December 8, 1997 (B.E. 2540), the Ministry of Finance by the Chairman of the Financial Sector Restructuring Authority ordered the defendant to close its operation permanently as shown in a copy of the order of the Financial Sector Restructuring Authority (FRA) No. 34/2540, Exhibit Lor. 5. In this regard, the said Board was appointed by virtue of Section 11 of thē Emergency Decree on Financial Sector Restructuring 1997 (B.E. 2540) as shown in a copy of the Emergency Decree on Financial Sector Restructuring 1997 (B.E. 2540), under Exhibit Lor. 6. The defendant was the plaintiffs creditor under the loan agreement for the amount of 116,132,160.21 Baht. The plaintiff had paid interest to the defendant continually until May 1997 (B.E. 2540). Afterwards, no payment of interest was made so the defendant charged default interest against the plaintiff at an annual rate of 35 percent as from December 1, 1997 (B.E. 2540) up to May 25, 1998 (B.E.

2541) in the amount of 19,603,060.90 Baht as shown in the Interest Calculation Table, Exhibit Lor. 8. The defendant charged maximum default interest rate based on clause 4.4 in the loan agreement, as shown in the loan agreement and the memorandum of agreement for the first amendment of, Exhibits Lor. 9 and Lor. 10. This was done by virtue of the right under the Notification of the Bank of Thailand and the plaintiffs notifications as shown in a copy of the Notification of the Bank of Thailand and a copy of the plaintiffs notification, Exhibits Lor. 11 and Lor. 12. On May 25, 1998 (B.E. 2541), the plaintiff had an overdue debt comprising the principal and interest in the amount of 135,735,221.11 Baht in which the defendant had already sent a performance demanding letter to the plaintiff as shown in the performance demanding letter, Exhibit Lor. 13. In August, 1996 (B.E. 2539), the defendant issued a prospectus offering the sales of CMIC debentures and on September 2, 1997 (B.E. 2539), the defendant issued debentures in a number of 1,500,000 units at a par value of 1,000 Baht and offered for sales at 1.000 Baht per unit at an annual interest rate of 11.40 percent with interest being paid on every March 2 and September 2 of each year. The first payment of interest was on March 2, B.E. 2540 as shown in the prospectus for debenture sales, Exhibit Lor. 19. The defendant made the first interest payment on schedule to all debenture holders. However, it did not make the second payment of interest because it had been ordered to suspend operation temporarily. Therefore any acts could not be performed by the defendant. However, at present the defendant has been allowed to transact as well as to make payment of the debenture interest as shown in a copy of the order of the Financial Sector Restructuring Authority, FRA No. 112/2541, Exhibit Lor. 7. On November 14, 1997 (B.E. 2540), the defen-

dant called a meeting of debenture holders to explain the reason why it was unable to pay interest to the debenture holders as shown in a copy of the minutes of debenture holders' meeting, Exhibit Lor. 20. As regards those who reeeived the Transfer of shares after the said date and took them for a setoff, such act was deemed as being in bad faith and the interest incurred after the date the defendant received the order of temporary suspension should be deemed as interest required no payment as shown in a copy of the Emergency Decree on Financial Sector Restructuring (No. 2) 1998 (B.E. 2541), Exhibit Lor. 21. Later, the plaintiff sent a letter to the defendant for making a setoff against the debt which the plaintiff was a debenture holder of the defendant in the amount of 116,000,000 Baht as well as demanding the defendant to return the collateral to the plaintiff as shown in a copy of the setoff requesting letters dated December 18, 1997 (B.E. 2540) and dated February 3, 1998 (B.E. 2541) respectively and tables showing the particulars of promissory notes and land title deeds, Exhibits Lor. 14 and Lor. 15. However, the defendant was unable to effect a setoff because such act would be in violation with the order of the Board of the Financial Sector Restructuring Authority, Exhibit Lor. 7. Earlier, the defendant sent an inquiry to such FRA Board as shown in the letter requesting the exercise of a setoff right, Exhibit Lor. 16. Later, the said Board sent a letter to the defendant prohibiting a setoff on grounds that on the day the plaintiff accepted the transfer of ownership the defendant had already been closed its business operation permanently. Therefore, it was deemed that the plaintiff exercise its right in bad faith, as shown in a copy of the Financial Sector Restructuring Authority, ERA. Nor. Por. No. 1531/2542, Exhibit Lor. 17. When the plaintiff accepted transfer of debentures on February 6, 1998 (B.E. 2541)

as shown in a copy of the Thai Farmers Bank Public Company Limited, Exhibit Lot. 18. The defendant was thus unable to make a setoff and return the collateral to the plaintiff. The plaintiff was required to claim from the Board of the Financial Sector Restructuring Authority.

The defendant expressly accepted the fact that the plaintiff's seal affixed in the power of attorney giving the power to enter an action was the same seal registered by the plaintiff at the Ministry of Commerce.

The plaintiff adduced that it was a juristic person according to law under the kind of a limited company, having two authorized directors to sign their names together and affix the company's seal for acting on behalf of the plaintiff as shown in the certificate, Exhibit Tor. 17. The plaintiff authorized Mr. Jareonporn Kosinanont, to act on its behalf as shown in the power of attorney, Exhibit Jor. 18. The seal affixed in Exhibit Jor. 17 and Exhibit Jor. 18 was the same seal as the plaintiff registered with the Ministry of Commerce, as shown in the form Bor. Ngor. Jor .3, Exhibit Jor. 19. On March 6, 1995 (B.E. 2538), the plaintiff entered into a loan agreement with Tisco Finance and Securities Public Company Limited and the defendant as shown in the loan agreement, Exhibit Jor. 5. Furthermore, on June 20, 1996 (B.E. 2539), the plaintiff made a memorandum of agreement for the first amendment of the loan agreement as shown in the memorandum of agreement for the amendment, Exhibit Jor. 6. The plaintiff agreed to borrow a loan from the said two companies in the amount of 750,000,000 Baht from Tisco Finance and Securities Public Company Limited and the defendant in a ratio of 70: 30 respectively. The plaintiff agreed to appoint Tisco Finance and Securities Public Company Limited as its loan manager, having the authority to collect relevant documents in relation to the plaintiff's loan and collat-

eral delivered to and placed with the two companies. The collateral that the plaintiff placed with Tisco Finance and Securities Public Company Limited were land title deeds of several plots of land, checks and promissory notes. On the signing date of the contract, the plaintiff did not receive a loan in the amount as financed. If drawdown under loan was to be made, the plaintiff shall have to submit a notice of drawdown to the defendant together with a promissory note in the amount equal to the drawndown amount plus interest at the rate specified in the contract. In entering into the said contract, Makkasan Real Estate Company Limited bound itself as the plaintiff's guarantor, as shown in a copy of the guarantee contract for all kinds of debts, Exhibit Jor. 20. On March 14, 1995 (B.E. 2538), the plaintiff mortgaged land title deeds No. 481, 482, 9646, 11234-11237, 15328-15330, 21330, 77217-77266, 140370 at Tambon Samisen Nai (South Bang Sue), Amphur Phayathai (Bang Sue), Bangkok Metropolis in a number of 36 plots of land to Tisco Finance and Securities Public Company Limited and the defendant as shown in the Land Mortagage Contract, Exhibit Jor. 21. On February 15, 1996 (B.E. 2539), the plaintiff combined and divided some part of collateralized land, making it become 55 plots of mortgaged land, comprising land title deeds No. 532-575, 481, 9646, 11237, 15328-15330, 77239, 77240, 77264-77266 at Tambon Samsen Nai (South Bang Sue), Amphur Phayathai (Bang Sue), Bangkok metropolis as shown in the list of the land title deeds, Exhibit Jor. 22. On February 22, 1996 (B.E. 2539), the plaintiff registered the redemption of 44 plots of mortgaged land, leaving the balance to be 11 plots of mortgaged land comprising land title deeds No. 481, 9646, 11237, 15328-15330, 77239, 77240, 77264-77266 at Tambon Samsen Nai (South Bang Sue), Amphur Phayathai (Bang Sue),

Bangkok Metropolis, as shown in list of the land title deeds registered for the discharge of mortgage and the list of the land title deeds registered for mortgage, Exhibits Jor. 23 and Jor. 24. On March 10, 1997 (B.E. 2540), the plaintiff re-mortgaged land title deed No. 533 which once had been registered for redemption of mortgage, making the mortgaged land to be 12 plots and the land discharged from mortgaged land to be 43 plots as shown in the list of the land title deeds, Exhibits Jor. 24/1 and Jor. 25. Later, the plaintiff issued the check of Thai Danu Bank Public Company Limited, No. 8098052 dated December 26, 1997 (B.E. 2540) payable to the defendant for the amount of 58,866,463.12 Baht to the defendant as shown in a photocopy of the check, Exhibit Jor. 26. Then, the plaintiff sold the redeemed land at a number of 12 plots, leaving the number of redeemed land held by Tisco Finance and Securities Public Company Limited to be 31 plots, as shown in the list of land discharged from mortgage, Exhibit Jor. 27. The plaintiff only drawdown the loan at the portion lent by the defendant for the amount of 170,997,572.09 Baht as well as continue to repay the principal and interest. Accordingly, the total amount of principal repaid by the plaintiff to the defendant was 54,865,411.88 Baht, as shown in a copy of the list of loan receipt and the list of principal repayment, Exhibits Jor. 28 and Jor. 29. In making the final repayment of the principal on December 2, 1997 (B.E. 2540) for the amount of 3,931,875 Baht, the plaintiff issued a check of Thai Danu Bank Public Company Limited, No. 8102865 dated January 15, 1998 (B.E. 2541) payable to the defendant for the amount of 54,934,588.12 Baht, as shown in a copy of the check, Exhibit Jor. 30 to the defendant to be held as a replacement of check No. 8098052, Exhibit Jor. 26. Although the defendant had the duty to return the said check to the

plaintiff, it did not do so by making an excuse that the check had not been found. In addition, the plaintiff issued two promissory notes to the defendant, namely, No. 013/2540 dated September 6, 1997 (B.E. 2540), promising to pay the defendant on demand a sum of 21,000,000 Baht and No. 016/2540 dated December 2, 1997 (B.E. 2540), promising to pay the defendant on demand a sum of 95,132,160.21 Baht plus interest at an annual rate of 18 percent, as shown in a photocopy of the promissory notes, Exhibits Jor. 31 and Tor. 32 with interest calculation starting as from December 1, 1997 (B.E. 2540) to December 17, 1997 (B.E. 2540). In combination of the principal, the plaintiff was in debt of the defendant for the amount of 117,050,429.69 Baht. In the case when a promissory note or check had been issued to the defendant, the defendant was bound to return the previous promissory note or check to the plaintiff. However, it appeared that the defendant did not return 3 promissory notes to the plaintiff, namely, promissory notes No. 001/2538, 00212538, 023/2539, 006/2540, 007/2540 and 015/2540 as shown in the list of promissory notes and charts, Exhibits Jor. 33 to Jor. 34. Oil August 28, 1996 (B.E. 2539), the defendant issued a prospectus offering the sales of its debentures, Exhibit Lor. 19 and then issued debentures at 1,000 Baht per share, with interest payment at an annual rate of 11.40 percent, payable on every March 2 and September 2 of each year. According to the Clause 12.1 in the prospectus, Exhibit Lor. 19 which specified that if the defendant ceased or discontinued the material business operation in whole or in part, it was deemed that the defendant was in default and clause 12.2 which specified that 2 or more debenture holders holding the debentures at a number of debentures not less than 25 percent of the total value of debentures were entitled to call a meeting of debenture

holders and pass a resolution to decide that the defendant is in default. On December 17, 1997 (B.E. 2540), the plaintiff bought the defendant's debentures for a number of 116,000 units, with a value of 116,000,000 Baht. On February 3, 1998 (B.E. 2541), the plaintiff notified Thai Farmers Bank Public Company Limited, of the transfer of debentures, as details shown in the notice of debentures transfer and the acknowledgment letter, Exhibits Jor. 42 and Jor. 43 in which Thai Manners Bank Public Company Limited, as the registrar of the debentures had already issued the certificate of debentures to the plaintiff as shown in the certificate of debentures, Exhibit Jor. 14, whereby the plaintiff had accepted the transfer of these debentures on December 17, 1997 (B.E. 2540) as details shown in the document issued by the Thailand Securities Depository with its translation version, Exhibits Jor. 12, Jor. 13 and Jor. 34. On September 2, 1997 (B.E. 2540), the defendant had the duty to pay the interest of debentures to the plaintiff, but it did not do so. On November 14, 1997 (B.E. 2540), the debenture holders' meeting passed a resolution to amend the terms and conditions of the debentures as well as a resolution to decide that the defendant was in default when the defendant did not make payment of interest to its debenture holders without the need to pass a resolution of the debenture holders, as shown in the minutes of debenture holders, Exhibit Lor. 20. Accordingly, the defendant was deemed as being in default of interest payment and the plaintiff was entitled to demand the payment of principal and interest from the defendant forthwith. In addition, on June 26, 1997 (B.E. 2540), the Ministry of Finance issued an order to suspend the defendant's business operation and instructed the defendant to submit a rehabilitation plan to the Board of the Financial Sector Restructuring Authority (FRA) for its approval. How-

ever, the plan did not pass the approval. Therefore, the Board issued an order appointing the new board of directors to take over the operation and proceed with the liquidation process, as shown in the order issued by the Financial Sector Restructuring Authority, Exhibit Jor. 16. It was deemed that the defendant had already ceased or discontinued its business operation, the defendant was then in default according to the terms and conditions of the prospectus, Exhibit Lor. 19. The plaintiff was thus entitled to demand the defendant to make payment of principal and interest, calculated at an annual interest rate of 11.40 percent from March 2, 1997 (B.E. 2540) to December 17, 1997 (B.E. 2540) in the amount of 10,470,509.59 Baht, making the total amount of principal and interest to be 126,470,509.59 Baht. On December 2, 1997 (B.E. 2540), the defendant issued a letter demanding the plaintiff to make repayment of principal and interest under the loan agreement, as shown in the demanding letter for principal repayment, Exhibit Jor. 35. The plaintiff thus sent a letter dated December 18, 1997 (B.E. 2540) to the defendant notifying the plaintiff's requirement to make a setoff, as shown in the setoff requesting letter, Exhibit Jor. 36. This resulted in a setoff between the plaintiff's debt and the defendant's debt Oil December 17, 1997 (B.E. 2540) and caused the plaintiff to become a creditor of the defendant in the amount of 9,420,679.90 Baht. On February 3, 1998 (B.E. 2541), the plaintiff sent a letter to the defendant confirming the setoff and require the defendant to return the collateral such as promissory notes, land title deeds and checks to the plaintiff, as shown in the setoff requesting letter and the acknowledgement letter. Exhibits Jor. 38 to Jar. 39. In this regard, the defendant had the duty to return 2 checks, as shown in Exhibits Jar. 26 and Jar. 30 and 8 promissory notes comprising No. 001/2538. No.

002/2538, No. 023/2539, No. 006/2540, No. 007/2540, No. 013/2540, No. 015/2540 and No. 016/2540 as shown in the list of promissory notes, Exhibit Jor. 40 and 12 land title deeds, as shown in the list of the land title deeds, Exhibit Jar. 41 to the plaintiff. However, the defendant neglected to do so.

The court considered the evidence adduced by the plaintiff and the defendant and found the fact can be admissible with the acceptance of two parties without any protest that the plaintiff is a juristic person according to law under the kind of a limited company, having two authorized directors to sign their names and affix the plaintiff's seal to act on behalf of the plaintiff as shown in the certificate, Exhibit Tor. 17. The plaintiff authorized Mr. Jareonporn Kosinanont to proceed with the case on its behalf as shown in the power of attorney, Exhibit Jor. 18. The defendant is a juristic person according to law under the kind of a public limited company, as shown in the certificate, Exhibit Lor. 1. The plaintiff entered into a loan agreement with Tisco Finance and Securities Public Company Limited and the defendant for the amount of 750,000,000 Baht in a ratio of 70: 30 respectively. In addition, the plaintiff agreed that Tisco Finance and Securities Public Company Limited shall act as its loan manager and has the authority to keep the originals of contracts related to debts and the collateral placed by the plaintiff, as details shown in the loan agreement and the memorandum of agreement for amendment, Exhibit Jor. 5 or Exhibit Lor. 9 and Exhibit Jor. 6 or Exhibit Lor. 10 whereby Makkasan Real Estate Company Limited was the plaintiff's guarantor as shown in the guarantee contract for all kinds of debt, Exhibit Jor. 20. According to the loan agreement, if the plaintiff was desirous to make a drawdown, the plaintiff was required to make a notice of drawdown and issue a

promissory note in the amount equal to the amount of drawdown plus interest at the rate specified in the contract and deliver to the defendant. As security for the performance of obligations, the plaintiff had mortgaged several plots of land with Tisco Finance and Securities Public Company Limited and the defendant. Later, the plaintiff combined and divided some part of the land title deeds as well as redeemed some plots of the mortgaged land, until the balance of land already redeemed being held by Tisco Finance and Securities Public Company Limited was 31 plots as shown in the list of land title deeds discharged from mortgage, Exhibit Jor. 27. After entering into the Loan agreement, the plaintiff made drawdown the loan from the defendant and had some overdue payment with the defendant. Later, the plaintiff bought the defendant's debentures in the amount of 116,000 units, amounting to 116,000,000 Baht with interest payment at an annual rate of 11.40 percent, payable on every March 2 and September 2 of each year. The first payment of interest was specified to be due on March 2, 1997 (B.E. 2540) as shown in the prospectus offering the sales of debentures, Exhibit Lor. 19. The defendant had duly made the first interest payment to all debenture holders. However, as regards the second payment which was due on September 2, 1997 (B.E. 2540), the defendant failed to pay interest. Later, the defendant sent the plaintiff a letter dated December 1, 1997 (B.E. 2540), demanding the plaintiff to make repayment of principal and interest under the loan agreement, as shown in the principal repayment demanding letter, Exhibit Jor. 35 or Exhibit Lor. 13. Accordingly, the plaintiff sent the defendant a tetter dated December 18, 1997 (B.E. 2540), for a setoff between the loan the plaintiff borrowed from the defendant and the debt in which the plaintiff was the defendant's debenture holder

as well as demanded the defendant to return the collateral to the plaintiff as details shown in the letter requesting for a setoff, Exhibit Jor. 36 or Exhibit Lor. 14 and Exhibit Jor. 38 or Exhibit Lor. 15. Therefore, in this case there are issues to be decided as follows:

The first (1) issue is whether or not the plaintiff has duly authorized Mr. Jareonporn Kosinanont, to act on its behalf. As the defendant set forth to accept the fact that the plaintiff's seal affixed in the power of attorney for filing this case is the same seal as the plaintiff registered with the Ministry of Commerce. Thus, there is no need to decide this issue as the fact is admissable that the plaintiff has duly authorized Mr. Jareonporn to proceed with the case:

As regards the second (2) issue, whether or not the defendant is entitled lawfully not to effect performance of obligation or a setoff to the plaintiff and the forth (4) issue, whether the plaintiff is entitled to take the debentures for a setoff against the defendant, it is appropriate to bring these two issues together for a judgment. The defendant has Mrs Pattamakorn Veerabutr Miss Kunya Supakanok, and Miss Hathairat Srikrit, testified in support of the document that on June 26, 1997 (B.E. 2540), the Ministry of Finance issued an order suspending the defendant's business operation and ordered the defendant to submit a plan for the merger with or transfer business to other financial institutions for its approval within 14 days. During that period, the defendant was allowed to transact only those activities specified by the Bank of Thailand and the Committee to Supervise the Merger and Transfer Business as shown in a copy of the order of the Ministry of Finance No. 138/2540, concerning the suspension of business operation, Exhibit Lor. 4. In this regard, the defendant had submitted its plan to the Ministry of Finance but did not obtain the

approval. On November 14, 1997 (B.E. 2540), the defendant called a meeting of debenture holders to explain the reason why it was unable to pay interest to the debenture holders as shown in a copy of the minutes of debenture holders' meeting, Exhibit Lor. 20. Later, on December 8, 1997 (B.E. 2540), the Ministry of Finance by the Chairman of the financial Sector Restructuring Authority ordered the defendant to close its operation permanently by removing the current board of directors and appointing the new one to take over the operation as shown in a copy of the Order of the Financial Sector Restructuring Authority (FRA) No. 34/2540, Exhibit Jor. 16 or Exhibit Lor. 5. The reason why the defendant did not pay the interest of debentures to the plaintiff was due to the order of temporary business suspension, so the defendant was unable to make any transactions including the payment of debenture interest as shown in the order of the Financial Sector Restructuring Authority No. FRA 112/2541 dated January 29, 1998 (B.E. 2541), Exhibit Jor. 15 or Exhibit Lor. 7. The defendant sent a letter dated May 6, 1998 (B.E. 2541) to the financial Sector Restructuring Authority inquiring the validity of the plaintiff's exercise of right for a setoff, as details shown in the letter inquiring the exercise of a setoff right. Exhibit Lor. 16. Later file Financial Sector Restructuring Authority issued a letter PRA Nor. Por. 1531/2541 dated July 31, 1998 (B.E. 2541), Exhibit Lot. 17 notifying the defendant that according to the policy of the PRA Board, the defendant was not permitted to effect a setoff between its loan debtors, being the plaintiff and the assignee bring the defendant's debenture holder because the acceptance of the Transfer of the said right to become a debenture holder was performed after the defendant had been ordered to suspend its business operation. It was deemed that such act was in bad faith. Even

though the plaintiff had accepted the transfer of debenture on February 6, 1998 (B.E. 2541), as details shown in a copy of Thai Farmers Bank Public Company Limited, Exhibit Lor. 18, the defendant was unable to effect a setoff and return collateral to the plaintiff. The plaintiff has Mr. Jareonporn Kosinanont and Miss Arunsri Jitsirihoon, being its witnesses, to testify in support of the document that the plaintiff accepted the transfer of debenture ownership from the defendant as from December 17, 1997 (B.E. 2540), as details shown in the document issued by the Thailand Securities Depository to the plaintiff with its Translation version, Exhibits Jor. 12 and Jor. 13 and Jor. 34. As regards the fact that the debenture holders' meeting passed a resolution to amend the terms and conditions of the debentures as well as a resolution to decide that the defendant was in default when the defendant did not make payment of interest to its debenture holders without the need to pass a resolution of the debenture holders, as shown in the minutes of debenture holders, Exhibit Lor. 20, and in such case the defendant was deemed as a party in default and the plaintiff was entitled to enforce the defendant to make payment of principal and interest forthwith and the fact that the Ministry of Finance issued an order suspending the business operation of the defendant as shown in the order of the Financial Sector Restructuring Authority. Exhibit Jor. 10 or Exhibit Lor. 5. Moreover, it can be deemed that the defendant is in default of payment under the terms and conditions of the prospectus, Exhibit Lor. 19 so when the plaintiff sent a letter notifying the exercise of setoff to the defendant, such notification resulted in the effectiveness of the setoff between the plaintiff's debt and the defendant's debt on December 17, 1997 (B.E. 2540). In this regard, the court is of the opinion that according to Section 7 of the Emergency Decree on

Financial Sector Restructuring 1997 (B.E. 2540). Exhibit Lor. 5. which specifies that the purpose of the Financial Sector Restructuring Authority shall be to deal with finance companies and finance and securities companies whose operations were suspended by the order of the Minister of Finance on June 26, 1997 (B.E. 2540) and August 5, 1997 (B.E. 2540) for (1) rehabilitating those suspended companies; (2) assisting the bona fide depositors and creditors of suspended companies: (3) administering the liquidation process of suspended companies whose operations are no longer viable and in Section 16, which specifies that the Board of the Financial Sector Restructuring Authority shall have the authority and duty to lay down policies and take general control and superintendence of the affairs of the FRA under Section 7. Such authority shall include

(2) issuing rules to assist bona fide depositors and creditors of the suspended companies. The court is of opinion that the intention of the said Emergency Decree is for rehabilitating those suspended companies and at the same time assisting the bona fide depositors and creditors of suspended companies. As regards the defendant's allegation that it could not effect a setoff against the plaintiff due to its compliance with the order of the Board of the Financial Sector Restructuring Authority under the letter No. FRA Nor. Por 153/2541 dated July 31, 1998 (B.E. 2541), Exhibit Lor. 17, The Court is of opinion that the explanation of the FRA Board under such letter has no legal status or as the order to he alleged for non-performance of obligations in accordance with the Civil and Commercial Code. It has status only as a guideline or recommendation for the defendant. The defendant has the duty to make a decision whether the plaintiff was a bona fide debenture assignee or not. If the plaintiff did it in bad faith, the defendant

had not bound to effect such setoff against the plaintiff's debt as it will be an act against the intention of the said Emergency Decree. As regards the letter of the said Financial Sector Restructuring Authority No. FRA 112/2541 dated January 29, 1998 (B.E. 2541), Exhibit Jor. 15 or Exhibit Lor. 7 specifying the items of transaction which the financial institutions are not allowed to conduct according to Part 2 of Clause 6 regarding the Setoff which specifies that the company was unable to undertake the setoff process between the loan debtor and the creditor who invested in the company's debentures, it just set forth a rule without taking into consideration whether the debenture investing creditor acted in good faith or not. Such rule is thus against Section 7 and Section 16 of the Emergency Decree on Financial Sector Restructuring 1097 (B.E. 2540). The defendant has no need to raise the order and the rule of the FRA Board against the plaintiff. However, the defendant made statements in defense that the plaintiff accepted the transfer of debentures and exercised the right for a setoff in bad faith. The Court is of the opinion that the defendant's defense has been made to be the case that since there is a defense against the plaintiff's claim, such claim may not he entitled to be setoff according in Section 344 of the Civil and Commercial Code. The allegation under this section shall he considered only whether it is admissible or not in relation to the defendant's allegation that there is a defense against the plaintiff's claim in this case. Such defense shall have sufficient grounds to be alleged and the Court has no need to consider to the extent whether the plaintiff loss its claim or not as it is not a direct dispute in this case. The fact of the said problem appears according to the plaintiff's evidence and the defendant's evidence that on June 26, 1997 (B.E. 2540), the Ministry of Finance issued an order in sus-

pend the defendant's operations for 30 days for its submission of a rehabilitation plan for merger or transfer business in other financial institutions. Later, on July 28, 1997 (B.E. 2540), the Ministry of Finance issued an order suspending the defendant's business operation temporarily as shown in the order of the Ministry of Finance, Exhibit Lor. 1. On December 1, 1997 (B.E. 2540), the defendant sent a loan repayment demanding letter to the plaintiff, whereby the principal was due to be repaid to the defendant on September 6, 1997 (B.E. 2540), for its performance of obligations within 15 days as shown in the loan repayment demanding letter, Exhibit Jor. 35 or Exhibit Lor. 13. On December 8, 1997 (B.E. 2540), the Financial Sector Restructuring Authority issued an order suspending the defendant's business operation temporarily by virtue of Section 30 of the Emergency Decree on Financial Sector Restructuring 1997 (B.13. 2540) and an order appointing the new board of directors to take over the operation in place of the defendant and to proceed with the liquidation process according to law, as shown in the order issued by the Financial Sector Restructuring Authority. Exhibit Jor. 16 or Exhibit Lor. 5. On December 17, 1997 (B.E. 2540), the plaintiff bought the defendant's debentures in the amount of 116,000 Bahts, being the value of 116,000,000 Baht as shown in Exhibits Jor. 12 and Jor. 13. On December 18, 1997 (B.E. 2540), the plaintiff sent a letter to the defendant for a setoff of the plaintiff's loan in the amount of 110.132.160.21 Baht against the defendant's debenture in the amount of 116,000,000 Baht, which resulted in making the debt extinguished as from plaintiff is entitled to file an action for a setoff. In this case there is no need to decide other issues.

It is judged that the case be dismissed without prejudicing the plaintiff's right to reenter an action. The costs and fees shall be fall.

Mr. Vudhichai Lhujittawat
Mr. Sompong Pandej
Mr. Jaroonvit Tongsorn Court Seal

Certified Copy

–Signature–
(Mrs. Valaya Poenjanavee)

Deputy Registrar of the Court
Acting on behalf of the Registrar of the
Civil Court of Southern Bangkok

–Translation–

THE BANK OF THAILAND

18 December B.E. 2540

To: Chairman

All Finance Companies and Finance and Securities Companies whose operations were permanently suspended by the Government

No. Tor. Por. Tor. For. (Wor) 4198/2540 Re: Set-Off

The Bank of Thailand has been informed by the Financial Sector Restructuring Authority that there is a situation relating to the purchase of bills from the former holders of the bills which are the creditors of the bills of Finance Companies or the Finance and Securities Companies whose operations were permanently suspended by the Government so that the purchaser of such bills will subrogate the rights to be the holders of the bills and the creditors of the Companies and thereafter they exercise the rights of the bill creditors to set-off debts with certain loan debtors of the Finance Companies and Finance and Securities Companies. Such event causes damages to other bona fide creditors of 56 Finance Companies or Finance and Securities Companies.

The Bank of Thailand hereby reiterates the Finance Companies or the Finance and Securities Companies to cease to act as a middle man or a supporter of such situation. Simultaneously, the Bank of Thailand would like to reestablish an understanding that in setting-off the debts, the Companies shall ask a prior permission from the Bank of Thailand which the Bank of Thailand will not give permission for the setting-off of the debts between the loan debtors and the bill creditors of the

Companies. As for the cast where the permission for the Companies to setoff the debts between the loan debtors and the bill creditors will be given, in the preliminary principle, the Bank of Thailand will consider giving permission only for the Companies acting in good faith.

Please be informed and comply with the Notification.

Regards,

–signature–

(Mr. Jarung Nukwan)
Deputy Govenor

Division No. 4
Finance Companies Inspection Department
Tel. 2835840

(3)

No. 05-1230

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

FINANCE ONE PUBLIC COMPANY LIMITED,

Petitioner,

v.

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

There are no parties to the proceeding other than those listed in the caption.

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Lehman Brothers Special Financing Inc. states that it has the following 100% parent company: Lehman Brothers Inc.; and that Lehman Brothers Inc. has the following 100% parent company: Lehman Brothers Holdings Inc. Lehman Brothers Special Financing Inc. further states that no publicly held company owns 10% or more of its stock directly; and that no publicly held company other than Lehman Brothers Holdings Inc. owns 10% or more of its stock indirectly.

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THA CASE

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Respondent Lehman Brothers Special Financing, Inc. ("LBSF") respectfully submits this brief in opposition to the petition of Finance One Public Company Limited ("Fin One") for a writ of certiorari (the "Petition") to review the decision of the United States Court of Appeals for the Second Circuit, filed on July 12, 2005 and reported at 414 F.3d 325 (the "Decision"), and the judgment resulting from that Decision.

INTRODUCTION

This case arises out of commercial dealings between two large financial institutions that took place primarily in the Kingdom of Thailand during the years 1995 through 1997. During those years, Fin One, a Thai corporation and the largest finance company in Thailand, engaged in certain routine finance transactions with LBSF and certain of its affiliates. Ultimately, events in the financial markets resulted in LBSF owing money to Fin One on some of these transactions and Fin One owing a somewhat lesser amount of money to LBSF on other transactions. LBSF set-off these mutual debts against each other and paid Fin One the difference it was owed. Fin One accepted that payment and later confirmed in writing that LBSF's set-off was valid.

Nevertheless, several years after the set-off and after Fin One had been placed in insolvency proceedings in Thailand, Fin One — at the direction of a liquidator appointed by a Thai government authority — brought a breach of contract action against LBSF seeking to invalidate the set-off and collect that portion of the debt which was satisfied by the set-off. Fin One easily could have brought its lawsuit in Thailand — which was where its offices were located, where LBSF transacted business and its affiliates had offices, where most of the events in question took place, and where Fin One's insolvency proceedings were pending. Instead, for

reasons it has never revealed, Fin One chose to bring its lawsuit in the United States District Court for the Southern District of New York.

Notwithstanding its choice of a United States forum, Fin One argued that the significant legal issues in the case, including the legitimacy of the set-off, should be decided under Thai law. The district court agreed that Thai law would be applied to determine the validity of the set-off. Thereafter, the parties submitted extensive affidavits from recognized Thai legal experts who explained the relevant Thai law. After reviewing the expert affidavits and supporting Thai law materials, and relying specifically on Federal Rule of Civil Procedure 44.1, the district court decided to appoint a special master to assist it in determining and applying Thai law. The district court chose, over LBSF's objection, a special master candidate proposed by Fin One. The special master (a professor who is Thai and also trained in the laws of other countries) prepared two reports for the district court in which he concluded that the Thai Civil and Commercial Code (the "Code") applied to the dispute and gave LBSF the right to set-off. Later, both the district court and the Second Circuit also found that LBSF had the right to set-off.

Fin One is no doubt unsatisfied with the decision it made several years ago to journey halfway around the world to champion its interpretation of Thai law — particularly when its arguments concerning Thai law were rejected by the special master, the district court and the Second Circuit — and therefore seeks yet another review of the case. However, Fin One is not entitled to further review because this case raises none of the compelling issues or broad questions of general importance that this Court requires before it will grant a writ of certiorari. Although Fin One has attempted to dress up its Petition by bemoaning an alleged "disarray in the lower

federal courts" and speculating about possible threats of "international discord," this case is nothing more than an ordinary commercial dispute between two financial institutions, which occurred in a unique factual context involving set-off rights under Thai law.

In a misguided effort to disguise the lack of merit in its Petition, Fin One attempts to manufacture a split among the circuits by arguing that the Decision changed *sub silentio* Second Circuit precedent so that, notwithstanding the plain language of Federal Rule of Civil Procedure 44.1, interpretation of foreign law is now treated as a "question of fact" with "evidentiary burdens" rather than as a "question of law." That argument ignores settled Second Circuit law construing and applying the plain language of Rule 44.1, and is based on nothing more than Fin One's tortured reading of snippets of the Decision. As demonstrated below, no split exists in the circuits and the Second Circuit properly applied Rule 44.1. Fin One's "international comity" argument is equally unavailing because it too is based on a misunderstanding of the relevant law as well as a fundamental misreading of the Decision.

Fin One's arguments have been considered (and rejected) by the special master, the district court and the Second Circuit. This case presents no issue that merits this Court's time and attention. The Petition should be denied.